(2) Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

THOMAS R. FOLEY, SR.,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition For Writ Of Certiorari To The New York State Court Of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Paul John Cambria, Jr., Esq.
Counsel of Record
LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
42 Delaware Avenue, Suite 300
Buffalo, New York 14202-3901
(716) 849-1333

Counsel for Petitioner

11 Centre Park
Rochester, New York 14614
(716) 232-6920

(B-3788)
THE DAILY RECORD

107 Delaware Avenue — Suite 81
Buffalo, New York 14202
(716) 847-2984

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STATE OF NEW YORK
COURT OF APPEALS

Stuart M. Cohen
Clerk of the Court

Clerk's Office
Albany, New York 12207-1095

DECISION April 11, 2000

4 No. 17

The People &c.,
Respondent,
v.
Thomas R. Foley, Sr.,
Appellant.

Order affirmed.
Opinion by Judge Wesley.
Chief Judge Kay and Judges
Bellacosa, Smith, Levine,
Ciparick and Rosenblatt concur.

STATE OF NEW YORK
COURT OF APPEALS

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4 No. 17

The People & c.,
Respondent,

v.

Thomas R. Foley, Sr.,
Appellant.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

Roger W. Wilcox, for appellant.
Michael A. Arcuri, for respondent.
Submitted by Robin A. Forshaw on behalf of Eliot Spitzer, Attorney General.

WESLEY, J.:

The main issue in this appeal focuses on the constitutionality of Penal Law § 235.22, enacted to address the convergence of predatory pedophile activity with Internet technology. Defendant contends that Penal Law § 235.22 is that it is a content-based restriction that scrutiny under the First Amendment, and that it violates the Commerce Clause. We disagree. The statute has a significant and distinct feature: it criminalizes the use of sexually explicit communications designed to lure children into harmful conduct. We thus hold that the statute withstands defendant's challenges.

In October 1996, a State Trooper assigned to the Computer Crime Unit logged onto the Internet and entered a chat

room entitled "KidsofFamilySex." The Trooper used the screen name "Aimee_" and began a discussion with defendant, Thomas R. Foley, Sr., who was using the screen name "JustMee." JustMee inquired whether Aimee_ wanted to "chat sex?" Aimee_ answered "OK," identifying herself as a 15-year-old girl who had sex with her father. JustMee identified himself as a 51-year-old male. The conversation lasted approximately two hours and was almost exclusively about sex. JustMee asked Aimee_ how she enjoyed having sex with her father, described how he would have sex with her and encouraged her to masturbate during their conversation. Aimee_ mentioned that she lived in Utica and JustMee informed her that he lived near Buffalo. During the conversation, JustMee sent several pictures to Aimee_ of "preteen girls and men" engaging in sexual acts.

During November 1996, JustMee had three other private on-line chats with Aimee_. In each conversation Aimee indicated that she was 15 years old. The conversations centered around sex; JustMee would encourage Aimee_ to masturbate and to describe having sex with her father. He said that he wanted to have sex with her, described how he would do so, and sent her pictures of minors engaging in sexual acts with other minors and with adults. In their third conversation, JustMee expressed his interest in meeting Aimee_ but cautioned that they would have to be careful. Aimee_ answered that she had cousins in Buffalo and that she could possibly arrange a visit. During their fourth conversation, JustMee again discussed their meeting, stating that they would have to be discreet and make the arrangements ahead of time. The discussion turned to the possibility of meeting, over Thanksgiving weekend.

The police obtained the identity of JustMee when they served a subpoena on the Internet service provider. As JustMee and Aimee_, in their fifth on-line conversation, discussed where they could meet in Buffalo, the police executed a no-knock search, warrant at defendant's residence and found him typing at his computer. Defendant admitted that he had used the screen name JustMee and had several chats with Aimee_, whom he believed to be 15 years old.

Defendant was indicted on three counts of promoting an obscene sexual performance by a child (Penal Law § 263.10), three counts of promoting a sexual performance by a child (Penal Law § 263.15), three counts of obscenity in the third degree (Penal Law § 235.05[l]) and two counts of attempted disseminating indecent material to minors in the first degree (Penal Law 110.00, 2-35.22[l] & [21). Prior to trial, defendant moved to dismiss the indictment on several grounds, among them that. the statute defining each count of the indictment was unconstitutional. County Court denied the motion.

During trial, defendant introduced the testimony of a computer expert who explained that with current technology, computer images could be easily manipulated. Of the many graphics sent by defendant to Aimee_, however, the expert could only point to one that appeared as if it had been altered. The jury was permitted to examine the pictures and was instructed as follows:

> "Section 263.25 of the Penal Law of the State of New York reads: Whenever it becomes necessary, for the purposes of the article, to determine whether a child who participated in a sexual

> performance was under the age of 16 years, the Court or Jury may make such determination by any of the following: Personal inspection of the child, inspection of a photograph or motion picture which constituted the sexual performance, oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance, expert medical testimony based upon the appearance of the child in the sexual performance, and any other method authorized by any applicable provision of law or by the rules of evidence at common law."

The jury found defendant guilty of two counts of promoting a sexual performance by a child and two counts of attempted disseminating indecent material to minors in the first degree. The Appellate Division unanimously affirmed the conviction, holding that Penal Law § 235.22 is constitutional. The court noted that Penal Law § 235.22 is a precise means of accomplishing the Legislature's objective to protect children from sexual abuse by prohibiting the dissemination of graphic images to a minor depicting nudity, sexual conduct or sadomasochistic abuse that is "harmful to minors," and the use of that material to lure the minor to engage in sexual activity. The court determined that Penal Law § 235.22 is neither impermissibly vague nor overbroad. The court further determined that the statute met First Amendment standards as a carefully drawn means of serving a compelling state interest. Finally, the court concluded that the statute did not violate the Commerce Clause and rejected defendant's contention that Penal Law § 263.15 is unconstitutionally overbroad. We affirm.

I .

Penal Law § 235.22 provides:

"A person is guilty of disseminating indecent material to minors in the first degree when:

"1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and

"2. by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit (emphasis added)."

Our analysis in this appeal focuses on two requirements that must be established before an individual can be subjected to criminal liability under the statute.-First, an individual must intentionally use a computer system to initiate or engage in the transmission of actual or simulated depictions of sexual activity for the purpose of communicating with a minor, knowing the

character and content of such communication (Penal Law § 235.22[1]). The communication must be "harmful to minors" as defined by Penal Law § 235.20 (6).[1] Second, the statute requires that an individual must "by means of such communication" importune, invite or induce the minor to engage in sexual activity for his or her benefit (Penal Law § 235.22[2]). The statute was enacted to address the growing concern that pedophiles are using the Internet as a forum to lure children (see, Governor's Mem approving L 1996, ch 600, 1996 McKinney's Session Laws of NY, at 1900-1901).

As a preamble to our analysis, we note that an enactment of the Legislature, a co-equal branch of government, is presumed to be valid, and that one seeking to invalidate a statute bears the heavy burden of showing that it is unconstitutional (People v Bright, 71 NY2d 376, 382; People v Davis, 43 NY2d 17, 30).

[1] Under Penal Law § 235.20(6), "harmful to minors" is described as "that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse" when it "[c]onsidered as a whole, appeals to the prurient interest in sex of minors," is "patently offensive" to the "prevailing standards in the adult community" as to what is suitable material for minors and "[c]onsidered as a whole, lacks serious literary, artistic, political and scientific value for minors" (Penal Law § 235.20[6]).

II.

The Overbreadth Doctrine

Defendant contends that, on its face, Penal Law § 235.22, is overbroad because it exposes individuals to criminal liability who unintentionally address a minor through sexually-oriented communication. We reject defendant's challenge.

As a general rule, a court will not hear a challenge to a statute from a person to whom the statute may be constitutionally applied on the ground that its application to others, not before the court, may possibly impair their constitutional rights (New York v Ferber, 458 US 747, 767; Broadrick v Oklahoma, 413 US 601, 610; see also, People v Hollman, 68 NY2d 202, 208). An exception has been carved out in the area of the First Amendment.

It has been recognized that "statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society" (Broadrick v Oklahoma, supra, 413 US 601, 611). Thus, a statute that attempts to proscribe constitutionally protected speech will not be enforced unless a limiting construction effectively removes the apparent threat to constitutionally protected expression (id., at 613).

A statute is subjected to less scrutiny where the behavior sought to be prohibited by the State moves from "pure speech" toward conduct "and that conduct -- even if expressive -- falls within the scope of otherwise valid criminal laws that reflect legitimate state interests" (id., at 615). Even though the statute, "if

too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct that is admittedly within its power to proscribe" (id.; see also, People v Hollman, 68 NY2d 202, 209). Thus, where conduct and not merely speech is involved, the overbreadth doctrine can be invoked only where the overbreadth is "substantial" (New York v Ferber, supra, 458 US 747, 769; Broadrick v Oklahoma, supra, 413 US 601, 615). The First Amendment overbreadth doctrine is "strong medicine;" it has been invoked by the courts with hesitation and "only as a last resort" (New York v Ferber, supra, at 769 [quoting Broadrick v Oklahoma, 413 US 601, 613]; see also, People v Hollman, supra, 68 NY2d 202, 208).

In Reno v American Civ. Liberties Union (521 US 844), the Supreme Court of the United States struck down the Communications Decency Act (47 USC § 223) as unconstitutionally overbroad. The Act prohibited the knowing transmission of "obscene or indecent" comments to any person under the age of 18 (47 USC § 223[a][1][B]) and using the Internet to send or display any comment or image that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" to any person under the age of 18 (47 USC § 223[d][1][B])). The Court noted that the breadth of the Act was unprecedented in that its scope was not limited to commercial speech or commercial entities; the statute's prohibitions embraced all entities and individuals posting indecent messages or displaying

them on their own computers in the presence of minors (Reno, supra, 521 US, at 877).[2]

Penal Law § 235.22 is readily distinguishable from the Communications Decency Act addressed in Reno. Unlike the Federal statute, Penal Law § 235.22 is not directed at the mere transmission of certain types of communication over the Internet. The second part of the statute -- the "luring prong" -- is significant. An invitation or enticement is distinguishable from pure speech. The terms "importune," "invite" or "induce" can. be likened to terms such as "procure" or "solicit" used to define the advancement of prostitution (Penal Law § 230.15) or the terms "request" or "command" used to describe criminal liability for the conduct of another (Penal Law § 20.00). They describe acts of communication; they do not describe the content of one's views. The terms identify forms of conduct which may provide a predicate for criminal liability. Penal Law § 235.22 is a preemptive strike against sexual abuse of children by creating criminal liability for conduct directed toward the ultimate acts of abuse.

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[2] One New York court has held that Penal Law § 235.22 similarly implicates the First Amendment. In People v Barrows (177 Misc 2d 712), the court turned to the second section of Penal Law § 235.22 pertaining to the violator's conduct in "importun[ing], invit[ing] or induc[ing] a minor to engage" in sexual activity for his or her benefit and determined that this devolved to nothing more than "speech in its purest form" (id., at 732). Then, analogizing Penal Law 235.22 to the Communications Decency Act, the court that Penal Law§ 235.22 was unconstitutionally overbroad and vague (id., at 733-734). We disagree with that analysis (see, People v Barrows, 174 Misc 2d 367).

Defendant contends that constitutionally protected speech among adults on the Internet may be affected by the statute because the statute does not require an individual "know" that he or she is communicating with a minor. For example, a "chat room" participant who sends a sexually explicit graphic image file with an accompanying message inviting other "chat room" participants to get together for lawful sexual activities runs the risk that a minor may have access to the "chat room" and receive the transmission. Such a participant, according to defendant, could thus be exposed to criminal liability.

Penal Law § 235.22(l) provides that a person is guilty of disseminating indecent material to a minor if, knowing the content of the communication, he "intentionally" uses any communication system to initiate or engage in such communication with a person who is a minor. The placement of the word "intentionally" in Penal Law § 235.22(l) should be read to modify everything that follows. Where a statute contains only one , reference to a particular mental state (such as "intentionally"), there is a presumption that the mental state applies to "every element of the offense unless an intent to limit its application clearly appears" (Penal Law § 15.15). Thus, contrary to defendant's assertion, the statute should be read as requiring that an individual intend to initiate this kind of communication with a minor and thereby further intend to "importune, invite or induce" the minor to engage in sexual conduct for the sender's benefit.

Defendant suggests that the legislative history of Penal Law §235.22 indicates that the statute was not to be so circumscribed. We conclude that the statute provides for the mental state of "intent" to limit the proscribed conduct. As one of the sponsors of the legislation stated, "[t]he purpose of this bill is

[to] deter individuals who would use computer networks to lure children into sexual relations by intentionally transmitting indecent materials to children through the computer networks. The bill would not hold liable a computer network or other individual who did not intentionally transmit the materials to minors" (Letter from Senator Sears to the Governor dated July 11, 1996, Bill Jacket, L 1996, ch 600).

Finally, we reject defendant's assertion that the term "harmful to minors" found in Penal Law § 235.22(l) is overbroad because it allows New York to impose its community standards nationwide. The term "harmful to minors" is specifically defined according to the guidelines enunciated by the Supreme Court in Miller v California (413 US 15, 24) and is further limited to actual or simulated "nudity," "sexual conduct" or "sado-masochistic abuse" (see, Penal Law § 235.22[l]; Penal Law § 235.20 [2], [3] & [5]). It is difficult to envision a situation where this conduct would not be considered harmful to minors outside New York when the statute seeks specifically to prohibit the intentional dissemination of this type of material to a minor in conjunction with the sender's enticement or invitation to the child to engage in sexual activity.

In short, the legitimate reach of Penal Law § 235.22 outweighs its "arguably impermissible applications" (New York v Ferber, supra, 458 US 747, 773). Thus, we conclude that the statute is not substantially overbroad.

Vagueness

Defendant also challenges Penal Law § 235.22 as unconstitutionally vague, arguing that the luring prong of Penal Law § 235.22(2) defines the prohibited conduct in unacceptably ambiguous terms. According to defendant, the phrase "importunes, invites or induces" and the phrase "sexual conduct for his benefit" not only fail to provide adequate notice of what is prohibited but also permit the arbitrary and discriminatory application of the law by both law enforcement authorities and fact-finders called upon to interpret the speech at issue. We disagree.

A statute is unconstitutionally vague if it fails to provide a person of ordinary intelligence with a reasonable opportunity to know what is prohibited, and it is written in a manner that permits or encourages arbitrary or discriminatory enforcement (Grayned v City of Rockford, 408 US 104, 108; see also, People v Shack, 86 NY2d 529, 538-539; People v Bright, supra, 71 NY2d, at 382). A vague law impermissibly delegates basic policy matters to law enforcement officials, judges and juries for resolution on an ad hoc, subjective basis "with the attendant dangers of arbitrary and discriminatory application" (Grayned, supra, 408 US, at 108-109). However, imprecise language does not render a statute fatally vague so long as that language ""conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices"' (People v Shack, supra, 86 NY2d 529, 538 [citing United States v Petrillo, 332 US 1, 8]).

In Reno, the major defect of the Communications Decency Act was its vagueness. Absent any definitions for the terms "indecent" and "patently offensive," the Act lacked the precision

that the First Amendment requires when a statute regulates the content of speech (521 US, at 874). The Supreme Court noted that the open-ended nature of the proscribed material added to the threat that the statute would censor speech that, in fact, would fall outside its scope (id.).

Unlike the terms "indecent" or "patently offensive" held to be vague in the Communications Decency Act, each and every term of Penal Law § 235.22 is either defined in the Penal Law or has a plain and ordinary meaning (see, Penal Law § 235.20). The term "benefit" as used in "for his benefit" is defined as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary" (Penal Law § 10.00[17]). While "importune," "invite" and "induce" are not defined terms, a person of ordinary intelligence would reasonably know that the statute is meant to prevent the intentional luring of minors to engage in sexual conduct through the dissemination of harmful, sexual images.

Moreover, we find no possibility of arbitrary or discriminatory enforcement of the statute. The combination of the precise terms described in the statute and the clearly pronounced elements "adequately defines the criminal conduct for the police officers, Judges and juries who will enforce the statute" (People v Shack, supra, 86 NY2d, at 539). Unlike the subjective terms used in the Federal Act, Penal Law § 235.22 employs objective, ascertainable standards which do not provide room for law enforcement officials to apply the statute based upon their own personal ideas of" right and wrong (People v Bright, supra, 71 NY2d, at 383). We therefore conclude that Penal Law § 235.22 is not unconstitutionally vague.

Content-Based Restriction

In addition to contesting the validity of Penal Law § 235.22 on First Amendment overbreadth and vagueness grounds, defendant asserts that the statute is an unconstitutional content-based restriction. Because Penal Law § 235.22 proscribes "sexually-oriented" communications, defendant maintains that it is an impermissible regulation on speech.

Content-based speech restrictions are presumptively invalid and will not survive strict scrutiny unless the government can show that the regulation promotes a compelling State interest and that it chose the least restrictive means to further the articulated interest (see, Sable Communications v FCC, 492 US 115, 126; Boos v Berry, 485 US 312, "321; see also, People ex rel. Arcara v Cloud Books, 68 NY2d 553, 559).

Sexually explicit communication is affected by the statute and thus the statute is content-based (see, Reno, supra, 521 US, 844, at 868); Penal Law § 235.22 prohibits the dissemination of a certain category of images to minors (Penal Law § 235.22[l]). The justification for the statute is related to the impact on the minor listener and cannot be properly analyzed as a content-neutral, time, place and manner restriction (Reno, supra, at 868; compare City of Erie v Pap's A.M. TDBA "Kandyland",___ U.S. ___, 2000 US Lexis 2347, *25). We nevertheless hold that Penal Law § 235.22 survives First Amendment strict scrutiny, because as noted earlier, it curtails the use of speech in a way which does not merit First Amendment protection and is a carefully tailored means of serving a compelling State interest (see, New York v Ferber, supra, 458 US 747; 773).

The primary legislative purpose behind the statute is "to protect the children of this State from high tech cybersex abuse and actual sexual abuse" (Governor's Mem approving Bill Jacket, L 1996, ch 600, 1996 McKinney's Session Laws of NY, at 1901). The State plainly has a "compelling" interest in protecting children from sexual exploitation in order to safeguard their "physical and psychological well-being" (New York v Ferber, supra, 458 US 747, 756 [quoting Globe Newspaper Co. v Superior Court, 457 US 596, 607]). "'It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute"' (New York v Ferber, supra, 458 US 747, 761-762 [quoting Giboney v Empire Storage & Ice Co., 336 US 490, 498]; see also, Osborne v Ohio, 495 US 103, 110). As a result, courts have recognized that speech used to further the sexual-exploitation of children does not enjoy constitutional protection (see, New York v Ferber, supra, 458 US 747 on remand to People v Ferber, 57 NY2d 256, 259; United States v Kufrovich, 997 F Supp 246, 254 [D. Conn]; United States v Powell, 1 F Supp 2d 1419, 1422 [N.D. Ala.]).

The speech-conduct sought to be prohibited by Penal Law § 235.2-12 -- the endangerment of children through the dissemination of sexually graphic material over the Internet -- does not merit First Amendment protection. In any event, the statute does not effectuate a total ban on the dissemination of sexual content communication, but merely limits its use (compare, City of Erie, supra, ___ U.S. ___, 2000 Lexis 2347, *30-31; Sable Communications v FCC, supra, 492 US 115, 129). Although the statute may incidentally burdensome protected expression in carrying out its objective, Penal Law § 235.22 serves the compelling interest of preventing the sexual abuse of children and

is no broader than necessary to achieve that purpose (see, People ex rel. Arcara v Cloud Books, supra, 68 NY2d 553, 558).

The Commerce Clause

Defendant's final assault on Penal Law § 235.22 is premised on the Commerce Clause. Relying on a recent Federal court decision -- American Libs. Assn. v Pataki (969 F Supp 160 [SDNY]) -- defendant contends that Penal Law § 235.22 unduly burdens interstate trade.

In American Libraries, the court struck down Penal Law § 235.21(3) as a violation of the Commerce Clause. Penal Law § 235.21(3) prohibits sending a sexually explicit depiction to a minor over the Internet. Because the Internet represents an instrument of interstate commerce, the court deemed Penal Law 235.21(3) to be "closely concerned with interstate commerce, and scrutiny of the [statute] under the Commerce Clause" was therefore "entirely appropriate"' (id., at 173). The court expressly distinguished Penal Law § 235.21(3) from Penal Law 235.22, recognizing that "plaintiffs do not challenge the sections of the statute that criminalize the sale of obscene materials to children, over the Internet or otherwise, and prohibit adults from luring children into sexual contact by communicating with them via the Internet" (id., at 179).

Penal Law § 235.22 does not discriminate against or burden interstate trade; it regulates the conduct of individuals who intend to use the Internet to endanger the welfare of children. Although Penal Law § 235.22 contains some of the same language as the provision in Penal Law § 235.21(3) struck down in American Libraries, the statute challenged here contains the

additional "luring" prong. We are hard pressed to ascertain any legitimate commerce that is derived from the intentional transmission of sexually graphic images to minors for the purpose of luring them into sexual activity. Indeed, the conduct sought to be sanctioned by Penal Law § 235.22 is of the sort that deserves no "economic" protection (see, New York v Ferber, supra, 458 US 747, 761-762). Thus, we conclude that Penal Law § 235.22 is a valid exercise of the State's general police powers (see, Lewis v BT Investment Mgrs., Inc., 447 US 27, 36).

III.

Finally, we address defendant's constitutional challenge to Penal Law § 263.15, which prohibits promoting a sexual performance by a child. Although the Supreme Court in New York v Ferber (supra, 458 US 747) has held that Penal Law § 263.15 is not unconstitutionally overbroad, defendant attempts to revisit the matter. Defendant notes that today's computer technology permits the manipulation of images such that the concerns addressed in Ferber regarding the harm caused to children as a result of the production of sexual performances are not presented here. Defendant argues that in the absence of an express instruction from the trial court that the People must prove the actual use of children in the prohibited performances, the statute is fatally overbroad.

Penal Law § 263.15 prohibits the promotion of any performance which includes sexual conduct by a child younger than 16 years of age. In Ferber, the Supreme Court held that the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct was de minimis (458 US, at 762). Since this class of material bears

heavily on the welfare of children, in the balance of competing interests, "it is permissible to consider these materials as without the protection of the First Amendment" (id., at 763). The Court then rejected the overbreadth challenge to Penal Law 263.15, holding that the statute's legitimate reach in addressing the harm of child pornography outweighs any arguably impermissible application (id. at 773). The Court concluded that any overbreadth which may exist should be cured on a 'case by-case analysis" at 774).

We are unpersuaded by defendant's speculative and broad reading of Penal Law § 263.15. Defendant fails to demonstrate any real or substantial overbreadth to invalidate the statute.

The statutory scheme allows the fact-finder to make a determination on the evidence submitted whether the performance involves an individual under the age of 16 (Penal Law § 263.25). In this case, defendant was permitted to introduce expert testimony challenging whether the images transmitted by defendant to Aimee_ actually depicted children or had been digitally spliced to "manufacture" the picture of a child performing a sexual act. Of the many images transmitted by defendant to Aimee_, defendant's expert could point to only one that may have been digitally altered. Defendant did not object to the Trial Court's charge on Penal Law § 263.25. The jury was thus instructed to consider, from the evidence before it, whether or not a child who participated in the performance was under the age of 16. Under these circumstances, we cannot conclude that, as applied to defendant, overbroad. We reject defendant's remaining contentions.

Accordingly, the order of the Appellate Division should be affirmed.

* * * * * * * * *

Opinion by Judge Wesley. Chief Judge Kaye and Judges Bellacosa, Smith, Levine, Ciparick and Rosenblatt concur.

Decided April 11, 2000

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. GEORGE BUNDY SMITH, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

ORDER GRANTING LEAVE

THOMAS R. FOLEY, SR.,

Appellant.

I, GEORGE BUNDY SMITH, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that in the record and proceedings herein* questions of law are involved which ought to be reviewed by the Court of Appeals and pursuant to §460.20 of the Criminal Procedure Law, it is therefore

ORDERED that permission be and it is hereby granted to the above-named appellant to appeal to the Court of Appeals.

Dated at New York, New York
August 30, 1999

/s/
Associate Judge

* Order of the Appellate Division, Fourth Department, entered June 18, 1999, affirming a judgment of the County Court, Oneida County, entered January 20, 1998.

* Description of Order:

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

674

PRESENT: PINE, J.P., HAYES, PIGOTT, JR., SCUDDER AND BALIO, JJ.

KA 98-2083

PEOPLE OF THE STATE OF NEW YORK,
PLAINTIFF-RESPONDENT,
V
THOMAS R. FOLEY, SR., DEFENDANT-APPELLANT

Thomas R. Foley, Sr., having appealed to this Court from the judgment of the Oneida County Court, entered in the Oneida County Clerk's Office on January 20, 1998, and said appeal having been argued by Herbert Greenman of counsel for defendant-appellant, William Weber of counsel for plaintiff-respondent, and due deliberation having been had thereon,

It is hereby ORDERED that the judgment so appealed from be and the same hereby is unanimously affirmed, and the matter is remitted to Oneida County Court for proceedings pursuant to CPL 460.50(5).

Opinion by Hayes, J., that is hereby made a part hereof.

Entered: June 18, 1999 CARL M. DARNALL, Clerk

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

(674) KA 98-2083. (Oneida Co.) -- PEOPLE OF THE STATE OF NEW YORK, PLAINTIFF-RESPONDENT, V THOMAS R. FOLEY, SR., DEFENDANT-APPELLANT. -- Judgment unanimously affirmed. Opinion by Hayes, J: Defendant appeals from a judgment convicting him following a jury trial of two counts each of promoting a sexual performance by a child (Penal Law §263.15) and attempted disseminating indecent material to minors in the first degree (Penal Law §§110.00, 235.22). Defendant challenges the constitutionality of Penal Law §235.22 and contends that alleged errors that occurred during trial require reversal. The judgment should be affirmed.

I

Defendant had a computer equipped with a modem and software to enable him to gain access to the Internet. The Internet links computer users from across the world via an international network *(see, Reno v American Civ. Liberties Union,* 521 US 844, 849). Individuals gain access to the Internet through various avenues, including Internet service providers such as America Online, CompuServe, the Microsoft Network and Prodigy *(see, Reno v American Civ. Liberties Union, supra,* at 850). An individual may obtain and transmit text, sound, pictures, and moving video images using various methods. One of those methods is the use of a "chat room". In a chat room, individuals engage in real-time dialogue, i.e., when a message is typed, it appears almost immediately on the computer screen of other individuals in the chat room. In addition, an individual can send pictures to another individual in the chat room. The chat rooms foster an exchange of information or ideas on a particular topic. Two individuals may break away from the main chat room to have a private chat. Individuals in the chat room use "screen names" of their choosing.

The Internet allows millions of individuals to gain access to a wide variety of educational and entertainment material. While the

Internet has innumerable benefits, it also has some negative aspects. Pedophiles have used the Internet to engage in sexually explicit communications with minors and then have attempted to arrange sexual encounters with those minors *(see,* Governor's Mem approving L 1996, ch 600). Penal Law 235.22 was enacted to prevent the abuse of children over the Internet and provides as follows:

> "A person is guilty of disseminating indecent material to minors in the first degree when:
>
> 1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
>
> 2. by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit."

There are four affirmative defenses to a prosecution under Penal Law §235.22:

> "3. In any prosecution for * * * disseminating indecent material to minors in the first degree pursuant to section 235.22 of this article, it shall be a defense that:
>
> (a) The defendant made a reasonable effort to ascertain the true age of the minor and

was unable to do so as a result of actions taken by the minor; or

(b) The defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to materials specified in such subdivision, which may involve any appropriate measures to restrict minors from access to such communications, including any method which is feasible under available technology; or

(c) The defendant has restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number; or

(d) The defendant has in good faith established a mechanism such that the labelling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or blocking capabilities to access that material or to circumvent any such screening or blocking"

(Penal Law §235.23[3]).

II

A State Trooper assigned to the Computer Crime Unit logged onto the Internet on October 28, 1996 and entered a chat room entitled "KidsofFamilySex". The Trooper used the screen name "Aimee_". Also in the chat room was a computer user, later identified as defendant, who used the screen name "JustMee". JustMee and Aimee_ engaged in a private chat. JustMee asked Aimee_ "Weana [sic] chat sex?", and Aimee_ answered "OK". Aimee_ identified herself as a 15-year-old girl who had sex with her father, while JustMee identified himself as a 51-year-old male.

The conversation lasted approximately two hours, and was almost exclusively about sex. JustMee asked Aimee_ whether she had ever masturbated and how she liked having sex with her father. JustMee described how he would have sex with her, and encouraged Aimee_ to masturbate during their conversation. Aimee_ said that she lived in Utica, while JustMee said that he lived on Grand Island near Buffalo. During the conversation, JustMee sent a few pictures to Aimee_ of "preteen girls and men" engaging in sexual acts.

JustMee had three other private chats with Aimee_ during the period from November 12 through 20, 1996. Each conversation lasted at least two hours, and each time Aimee_ indicated that she was 15 years old. Each conversation centered around sex; JustMee would encourage Aimee_ to masturbate and to describe having sex with her father. JustMee told Aimee_ that he wanted to have sex with her and described how he would do so. JustMee sent Aimee_ more pictures of minors engaging in sexual acts with other minors and with adults. During the third conversation, JustMee described where he lived and said that he wished they could meet, but that they would have to be careful if they did meet. Aimee_ said that she had cousins in Buffalo and could possibly make the trip to Buffalo. During the fourth conversation, JustMee again discussed meeting with Aimee_; he said that they would have to be discreet and meet in a parking area at night. JustMee said they would need to make arrangements ahead of time, and they discussed the possibility of meeting over Thanksgiving weekend.

The police obtained the identity of JustMee by service of a subpoena on the Internet service provider. On November 22, 1996, JustMee and Aimee_ engaged in their fifth on-line conversation. They discussed where they could meet in Buffalo. During that conversation, the police executed a no-knock search warrant at defendant's residence and found defendant typing at his computer. Defendant admitted that he had used the screen name JustMee and had several chats with Aimee_, whom he believed to be 15 years old.

III

Defendant contends that Penal Law §235.22 is unconstitutionally overbroad and vague, that it is a content-based restriction that cannot survive strict scrutiny, and that it violates the Commerce Clause. Kings County Supreme Court is the only court to have addressed the constitutionality of the statute. Ruling on a defendant's pretrial motion to dismiss, the court (Marrus, J.) found that the statute was not unconstitutionally vague or overbroad and did not violate the Commerce Clause (see, *People v* Barrows, 174 Misc2d 367, 372-373). After a jury trial, Barrows was found guilty of two counts of attempted disseminating indecent material to minors in the first degree (Penal Law §§110.00, 235.22) and one count of promoting an obscene sexual performance by a child (Penal Law §263.10). He then moved, pursuant to CPL 330.30, to set aside the verdict on the ground that the statutes are unconstitutional and violate the First Amendment and the Commerce Clause. This time, the court (Demarest, J.) agreed with Barrows with respect to Penal Law §235.22 and set aside the verdict with respect to those counts *(People v Barrows,* 177 Misc 2d 712). We conclude that Penal Law §235.22 is not unconstitutional.

State statutes carry a strong presumption of constitutionality and should be stricken as unconstitutional only as a last resort *(see, People v Davis,* 43 NY2d 17, 30, *rearg dismissed* 61 NY2d 670, *cert denied* 435 US 998). "The traditional rule is that a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the Court" *(New York v Ferber,* 458 US 747, 767) . The First Amendment overbreadth doctrine is, however, one of the few exceptions to that general principle *(see, New York v Ferber, supra,* at 768). Thus, defendant may attack an overly broad statute even though, as here, his conduct "could be proscribed by a law drawn with the requisite specificity" *(New York v Ferber, supra,* at 769; *see, Alexander v United States,* 509 US 544, 555, *reh denied* 510 US 909).

The overbreadth doctrine is to be applied sparingly and only as a last resort *(see, Broadrick v Oklahoma,* 413 US 601, 613). It is to be applied whenever a statute "imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech" *(Secretary of State of Md. v Munson Co.,* 467 US 947, 967-968). However, the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge" *(Members of City Council v Taxpayers for Vincent,* 466 US 789, 800). Further, an individual may challenge a statute as overbroad "only when the statute's unconstitutional reach is substantial and the statute is incapable of a reasonable limiting construction" *(People v Hollman,* 68 NY2d 202, 208) .

The Legislature's objective in enacting Penal Law §235.22 was to protect children from "high-tech cybersex abuse and actual sexual abuse" (Governor's Mem approving L 1996, ch 600) . The statute has two prongs, both of which must be met in order for an individual to be convicted under the statute. The first prong involves the dissemination of graphic images to a minor depicting nudity, sexual conduct or sadomasochistic abuse that is "harmful to minors". The statute provides:

> "6. 'Harmful to minors.' means that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
>
> (a) Considered as a whole, appeals to the prurient interest in sex of minors; and
>
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable for minors; and
>
> (c) Considered as a whole, lacks serious literary, artistic, political, and scientific value for minors"

(Penal Law §235.20[6]). That definition mirrors the permissible standard set forth in *Miller v California* (413 US 15, 24, *reh denied* 414 US 881) . The second prong is the "luring" prong. It prohibits the conduct of importuning, inviting, or inducing a minor to engage in sexual activity. Penal Law §235.22 is a precise means of accomplishing the Legislature's objectives. Under the statute, adults may send sexual images to another adult, and may also invite that adult to engage in sexual relations without risking prosecution under the statute. Only when an individual sends graphic images to a minor and then attempts to lure that minor into sexual activity does he risk conviction under the statute. Because of the two-pronged nature of the statute, communication between adults would not be chilled *(cf., Sable Communications of California v Federal Communications Commn.*, 492 US 115, 131). Contrary to defendant's contention, the statute is not similar to the Federal Communications Decency Act of 1996 (CDA) recently analyzed by the Supreme Court in *Reno v American Civ. Liberties Union* (521 US 844, *supra)*. The CDA prohibited the knowing transmission of obscene or indecent messages to any recipient under age 18, and prohibited the knowing sending or displaying of patently offensive messages in a manner that is available to a person under age 18 *(see, Reno v American Civ. Liberties Union, supra,* at 858-860). The CDA did not define "indecent" or "patently offensive", and thus there would be uncertainty among speakers concerning the meaning of those terms *(see, Reno v American Civ. Liberties Union, supra,* at 871). In contrast, Penal Law §235.22 defines what graphic images would be "harmful to minors" *(see,* Penal Law §235.20 [61) and proscribes specific acts by individuals.

Defendant sets forth two examples of impermissible applications of the statute that would render it unconstitutionally overbroad. However, those situations would not occur with such frequency that the statute should be considered overbroad *(see, e.g., Members of City Council v Taxpayers for Vincent, supra,* at 800-801). Whatever overbreadth might exist in this statute can be cured by a case-by-case analysis *(see, New York v Ferber, supra,* at 773-774). Any impermissible applications of the statute would

represent only a tiny fraction of the conduct within the statute's reach and thus the overbreadth is not substantial *(see, People v Hollman, supra,* at 209; *see also, New York v Ferber, supra,* at 773-774).

Defendant further contends that Penal Law §235.22 is impermissibly vague. The "void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement" *(Kolender v Lawson,* 461 US 352, 357; *see, Hoffman Estates v The Flipside, Hoffman Estates,* 455 US 489, 498, *reh denied* 456 US 950; *People v First Meridian Planning Corp.,* 86 NY2d 608, 621-622).

Defendant contends that the following terms are vague: It sexual contact", "importunes, invites or induces", "sexual conduct", and "harmful to minors". We disagree. "Sexual contact", while not defined in Penal Law §235.22, is defined elsewhere in the Penal Law as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing" (Penal Law §130.00 [3]) In addition, the meaning of "sexual contact" can be inferred from the other prohibited conduct, i.e., sexual intercourse and deviate sexual intercourse. The terms "importunes, invites or induces" are common terms with common ordinary meanings *(see generally, People v First Meridian Planning Corp., supra,* at 622; *see also, Beauharnais v Illinois,* 343 US 250, 253, *reh denied* 343 US 988). "Sexual conduct" is defined as "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast" (Penal Law §235.20[3]) . All the terms within that definition are commonly used terms and are not vague. Finally, "harmful to minors" is defined in Penal Law §235.20(6) and has been held sufficient to give adequate notice to individuals *(see, Ginsberg v New York,* 390 US 629, 643, *reh denied* 391 US 971).

IV

Defendant also contends that Penal Law §235.22 is an impermissible content-based restriction on speech. A statute that is enacted for the purpose of restraining speech on the basis of its content presumptively violates the First Amendment *(see, City of Renton v Playtime Theatres,* 475 US 41, 46-47, *reh denied* 475 US 1132; *Matter of Town of Islip v Caviglia,* 73 NY2d 544, 556). The purpose of the statute here is to protect children from the primary effects of the transmission of offensive speech, and thus the statute is a content-based restriction on speech *(see, e.g., Reno v American Civ. Liberties Union, supra,* at 868, 871). In order for the statute to remain valid, it must be a precisely drawn means of serving a compelling State interest *(see, Consolidated Edison Co. v Public Serv. Commn. of N.Y.,* 447 US 530, 540). In addition, "when government regulation designed to carry out a legitimate and important State objective would incidentally burden free expression, the government's action cannot be sustained unless the State can prove that it is no broader than needed to achieve its purpose" *(People ex rel. Arcara v Cloud Books,* 68 NY2d 553, 558).

It is well settled "that a State's interest in 'safeguarding the physical and psychological well-being of a minor' is 'compelling,'" *(New York v Ferber, supra,* at 756-757, quoting *Globe Newspaper Co. v Superior Court,* 457 US 596, 607; *see also, Sable Communications of California v Federal Communications Commn., supra,* at 126). For the same reasons that we concluded that Penal Law §235.22 is not overbroad, we also conclude that the statute is a precisely drawn means of serving a compelling interest, and is no broader than necessary. The statute is thus constitutional under the First Amendment.

V

Defendant further contends that Penal Law §235.22 violates the Commerce Clause. The Commerce Clause is a grant of authority to Congress to "regulate Commerce * * * among the several States" (US Const art 1, §8, cl 3) . The Commerce Clause "embodies a negative command forbidding the States to discriminate against interstate trade" *(Associated Indus. of*

Missouri v Lohman, 511 US 641, 646; *see, Homier Distrib. Co. v City of Albany,* 90 NY2d 153, 158). Where local legislative objectives are credibly advanced in support of a statute and there is no patent discrimination against interstate trade, the statute will be upheld "'unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits," *(City of Philadelphia v New Jersey,* 437 US 617, 624, quoting *Pike v Bruce Church,* 397 US 137, 142; *see also, Raymond Motor Transp. v Rice,* 434 US 429, 440). The purpose of Penal Law §235.22 was not to regulate commerce, but to protect the children of this State who use the Internet. The statute is not an economic protectionist measure, but rather is directed at a legitimate local concern.

In *American Libs. Assn. v Pataki* (969 F Supp 160), the District Court for the Southern District of New York granted plaintiffs' motion for a preliminary injunction, finding that Penal Law §235.21(3) violated the Commerce Clause. That statute is similar to the first prong of Penal Law §235.22, but it does not include the second "luring" prong found in Penal Law §235.22(2). The inclusion of the second prong in Penal Law §235.22 narrows its scope and lessens any burden on commerce. Indeed, we cannot conceive of any legitimate commerce involving the sending of graphic images to minors while at the same time attempting to lure them into engaging in sexual activity. We conclude that any incidental effects that Penal Law §235.22 may have on commerce are not unduly burdensome in relation to the compelling interest of the State in protecting children.

VI

Defendant contends that various alleged errors during trial require reversal. We disagree. Defendant failed to preserve for our review his contention that County Court's charge to the jury on Penal Law §235.22 was erroneous *(see,* CPL 470.05[2]; *People* v Hill, 236 AD2d 799, 800, *lv denied* 89 NY2d 1036). In any event, defendant's contention is without merit. The statute does not require the People to prove that defendant intended his communication to be received by a minor.

Defendant's conviction under Penal Law §263.15 is based on legally sufficient evidence and the verdict is not against the weight of the evidence *(see, People v Bleakley,* 69 NY2d 490, 495). The People submitted sufficient proof that the graphic images sent by defendant were pictures of actual children and had not been altered. The jury had the pictures before it to review, and its determination that the pictures represented actual children is supported by the record.

The court did not improperly restrict the cross-examination of the State Trooper regarding his alcohol addiction. While it was proper for defense counsel to cross-examine the Trooper concerning his use of alcohol during the computer conversations with defendant, it was improper for counsel to cross-examine him regarding his alcohol use where such alcohol use had no relation to his ability to recall or perceive the events in question *(see, People v Freeland,* 36 NY2d 518, 525; *People v Perotti,* 233 AD2d 936, *lv denied* 89 NY2d 945; *People v Van Nostrand,* 217 AD2d 800, 802, *lv denied* 87 NY2d 851).

Prior to trial, defense counsel was informed that the Trooper had been arrested for assaulting his wife, resulting in his suspension from work. Counsel sought discovery of the Trooper's personnel file. Police personnel records are confidential, but they may be turned over to a defendant if they contain exculpatory information *(see, People v Gissendanner,* 48 NY2d 543, 547-548). Here, the court conducted an in camera inspection of the file and determined that it contained no exculpatory material. In any event, even if the material was exculpatory and should have been disclosed, there is no reasonable possibility that the failure to disclose that information contributed to the verdict *(see, People v Vilardi,* 76 NY2d 67, 77). Defendant was aware of the arrest and the facts surrounding it, and he used that information to cross-examine the Trooper *(see, People v Cortijo,* 70 NY2d 868).

The court properly admitted into evidence a computer disk containing the conversations between the Trooper and defendant as well as the graphic images sent by defendant to the Trooper. The contents of the computer disk were unique, and the Trooper's

identification of the disk was sufficient evidence of its accuracy and authenticity *(see, People v Julian,* 41 NY2d 340, 343; *People v Taylor,* 206 AD2d 904, 905, *lv denied* 84 NY2d 940).

Finally, the court's charge to the jury with respect to the definition of "performance" as that term is used in Penal Law §263.15 adequately conveyed the law to the jury with respect to the elements of the crime of promoting a sexual performance by a child *(see generally, People v Woods,* 41 NY2d 279, 283). In any event, the court's supplemental charge to the jury eliminated any prejudice to defendant that may have resulted from the initial charge *(see, People v Dean,* 56 AD2d 242, 253, *affd* 45 NY2d 651, *rearg denied* 46 NY2d 940; *People v Strong,*___ AD2d ___ [decided Dec. 14, 1998], *lv denied* 93 NY2d 858; *People v* Cannon, 168 AD2d 356, *lv denied* 77 NY2d 904).

VII

Accordingly, the judgment should be affirmed. (Appeal from Judgment of Oneida County Court, Dwyer, J. - Promoting Sexual Performance by Child.) PRESENT: PINE, J. P., HAYES, PIGOTT, JR., SCUDDER AND BALIO, JJ. (Filed June 18, 1999.)

STATE OF NEW YORK
ONEIDA COUNTY COURT
ONEIDA COUNTY COURT HOUSE
ELIZABETH STREET
UTICA, NEW YORK 13501

SHARON CARRAWAY
ASSOCIATE COURT CLERK
315-798-5809

RECORD OF CONVICTION
ONEIDA COUNTY COURT

STATE OF NEW YORK)
COUNTY OF ONEIDA) INDICTMENT NO: I97-158
CITY OF UTICA) SCI NO.:_____

PEOPLE OF THE STATE OF NEW YORK
VS.
THOMAS R. FOLEY, SR.

D.O.B.: 10-08-45

THE ABOVE-NAMED WAS DULY CONVICTED IN **ONEIDA COUNTY COURT** ON 11/25/97 UPON A TRIAL OF Promoting Sexual Performance by a Child (Oct. 28, 1996 to Nov. 20, 1996) (263.15) PL, Felony (2 cts.) and attempted Disseminating Indecent Material to minors (110/235.22-1 & 2) (2 cts.) ON 01-20-98, WAS SENTENCED TO On (263.15) PL, Felon 2 cts., two to six years on each count, and on (110/235.22) PL, Felony 2 cts., one to three years on each count, to run concurrent.

I CERTIFY THAT THE ABOVE IS A TRUE
EXTRACT FROM THE MINUTES OF SAID
COURT, KEPT BY ME AS A CLERK THEREOF.

/s/_____
SUSAN M. NOWAK, COURT CLERK

WITNESS THE SEAL OF SAID COURT,
AT THE CITY OF UTICA, NEW YORK,
THIS 25th DAY OF February, 1998.

§235.23 Disseminating indecent material to minors; presumption and defenses

1. A person who engages in the conduct proscribed by section 235.21 is presumed to do so with knowledge of the character and content of the material sold or loaned, or the motion picture, show or presentation exhibited or to be exhibited.

2. In any prosecution for disseminating indecent material to minors in the second degree pursuant to subdivision one or two of section 235.21 of this article, it is an affirmative defense that:

(a) The defendant had reasonable cause to believe that the minor involved was seventeen years old or more; and

(b) Such minor exhibited to the defendant a draft card, driver's license, birth certificate or other official or apparently official document purporting to establish that such minor was seventeen years old or more.

3. In any prosecution for disseminating indecent material to minors in the second degree pursuant to subdivision three of section 235.21 of this article or disseminating indecent material to minors in the first degree pursuant to section 235.22 of this article, it shall be a defense that:

(a) The defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of actions taken by the minor; or

(b) The defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to materials specified in such subdivision, which may involve any appropriate measures to restrict minors from access to such communications, including any method which is feasible under available technology; or

(c) The defendant has restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number; or

(d) The defendant has in good faith established a mechanism such that the labelling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or blocking capabilities to access that material or to circumvent any such screening or blocking.

§235.24 Disseminating indecent material to minors; limitations

In any prosecution for disseminating indecent material to minors in the second degree pursuant to subdivision three of section 235.21 of this article or disseminating indecent material to minors in the first degree pursuant to section 235.22 of this article:

1. No person shall be held to have violated such provisions solely for providing access or connection to or from a facility, system, or network not under that person's control, including transmission, downloading, intermediate storage, access software, or other related capabilities that are incidental to providing such access or connection that do not include the creation of the content of the communication.

(a) The limitations provided by this subdivision shall not be applicable to a person who is a conspirator with an entity actively involved in the creation or knowing distribution of communications that violate such provisions, or who knowingly advertises the availability of such communications.

(b) The limitations provided by this subdivision shall not be applicable to a person who provides access or connection to a facility, system, or network engaged in the violation of such provisions that is owned or controlled by such person.

2. No employer shall be held liable under such provisions for the actions of an employee or agent unless the employee's or agent's conduct is within the scope of his employment or agency and the employer having knowledge of such conduct, authorizes or ratifies such conduct, or recklessly disregards such conduct.

A-39

To be Argued by:
Paul J. Cambria, Jr., Esq.
Estimated Time for Argument:
30 Minutes

STATE OF NEW YORK
COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

THOMAS R. FOLEY, SR.,
Appellant.

Appellate Division, Fourth Department
Docket No. KA 98-2083

Oneida County Indictment No. 97-158

BRIEF FOR APPELLANT

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
PAUL J. CAMBRIA, JR., ESQ.
ROGER W. WILCOX, JR., ESQ.
Attorneys for Defendant/Appellant
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

November 4, 1999

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JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to Criminal Procedure Law Sections 450.90(1), 460.20 and 470.35(1) to entertain this appeal and to review the questions raised herein. These issues were raised at the Appellate Division, Fourth Department, and were properly preserved at trial [see, pages 27-30, 32-33, 35, 37, 134-43, 175, 970, 1204-05 and 1321-23 of the Record on Appeal].

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered in Oneida County Court (Dwyer, J.) on January 20, 1998. An indictment was filed on May 8, 1997, charging appellant, Thomas R. Foley, Sr., with the following offenses: Promoting an Obscene Sexual Performance by a Child in violation of Penal Law §263.10 (three counts); Promoting a Sexual Performance by a Child in violation of Penal Law §263.15 (three counts); Obscenity in the Third Degree in violation of Penal Law §235.05(1) (three counts); Attempted Disseminating Indecent Material to Minors in the First Degree in violation of Penal Law §§ 110/235.22(1) and (2) (two counts).

A jury trial was conducted from November 18-25, 1997. Prior to opening arguments, the People moved to dismiss six counts of Obscenity in the Third Degree and Promoting an Obscene Sexual Performance by a Child. The jury ultimately returned a verdict convicting defendant of two counts of Promoting a Sexual Performance by a Child (Penal Law §263.15) and two counts of Attempted Disseminating Indecent Material to Minors in the First Degree (Penal Law §110/235.22). On January 20, 1998, the Honorable Michael L. Dwyer sentenced defendant to two to six years incarceration on each conviction of Promoting Sexual Performance by a Child and imposed one to three years

incarceration on each conviction of Attempted Disseminating Indecent Materials to Minors. These sentences are to run concurrently.

A timely Notice of Appeal was filed on appellant's behalf. On November 20, 1998 appellant filed a brief on appeal with the Appellate Division, Fourth Department. Appellant challenged his convictions on eleven grounds, arguing that:

(1) Penal Law §235.22 is unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, §8 of the Constitution of the State of New York;

(2) Penal Law §235.22 violates the Commerce Clause;

(3) Penal Law §235.22 is a content-based restriction on speech which cannot survive strict scrutiny;

(4) Penal Law §235.22 is unconstitutionally vague;

(5) The trial court erred in failing to charge that the People must prove that appellant had a specific intent to communicate with a minor;

(6) Appellant's convictions for promoting the sexual performance of a child are not supported by legally sufficient evidence and are against the weight of the evidence;

(7) Penal Law §263.15 is unconstitutionally overbroad;

(8) The trial court's restriction of cross-examination by counsel denied appellant his constitutionally guaranteed right to confrontation;

(9) The People failed to comply with appellant's discovery demand for Brady material;

(10) The prosecution did not establish an unbroken chain of custody with respect to the evidence admitted at trial; and

(11) The trial court's charge to the jury with respect to "performance" denied appellant a fair trial.

The People filed a responding brief on or about March 22, 1999. Oral argument was heard on April 8, 1999. The Appellate Division, Fourth Department, issued its Decision and Order on June 18, 1999. Leave was granted by order of the Honorable George Bundy Smith dated August 30, 1999.

Appellant is represented on this appeal by Paul J. Cambria, Jr., Esq. of the law firm Lipsitz, Green, Fahringer, Roll, Salisbury & Cambria LLP. The People of the State of New York have been represented throughout these proceedings by Michael A. Arcuri, Esq., Oneida County District Attorney.

No stay of execution of judgment has been granted by the Court in this case.

QUESTIONS PRESENTED

1. Is Penal Law §235.22 unconstitutionally overbroad in violation of the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Constitution of the State of New York?

   The Appellate Division ruled that Penal Law §235.22 is not unconstitutionally overbroad.

2. Does Penal Law §235.22 violate the Commerce Clause?

   The Appellate Division found that Penal Law §235.22 does not violate the Commerce Clause.

3. Is Penal Law §235.22 unconstitutionally vague?

   The Appellate Division determined that Penal Law §235.22 is not unconstitutionally vague.

4. Is Penal Law §235.22 a content based restriction on speech which cannot survive strict scrutiny?

   The Appellate Division concluded that Penal Law §235.22 is a content-based restriction on speech which passes muster under the strict scrutiny test.

5. Is Penal Law §263.15 unconstitutionally overbroad?

   The Appellate Division did not directly answer this question.

6. Are appellant's convictions for promoting sexual performance of a child supported by legally sufficient evidence?

The Appellate Division held that appellant's convictions pursuant to Penal Law §263.15 were supported by the legally sufficient evidence.

7. Did the trial court's restriction of cross-examination by appellant deny him his constitutionally guaranteed right to confrontation?

The Appellate Division concluded that appellant was not deprived of his constitutionally guaranteed right to confrontation.

8. Did the prosecution establish the required unbroken chain of custody with respect to crucial physical evidence admitted at trial?

The Appellate Division concluded that the chain of custody was sufficiently established by trial testimony.

STATEMENT OF FACTS

The focus of this case is on Internet communication and the transmission of graphic images via computer. "The Internet" is a collection of millions of computers connected to each other via a global network. Computer users can access this network through Internet Service Providers which essentially permit their subscribers to use one of numerous modems provided by the service provider in order to connect to the Internet through heavy-duty cable lines [491-92, 988]. The services are usually provided for a monthly access fee and usually provides the subscriber with electronic mail

capabilities [492]. Access to the Internet via an Internet Service Provider allows computer users to communicate in approximately real time with other computer users. Often, these "computer conversations" occur in what are known as "chat rooms."

Communication on the Internet sometimes takes place in "chat rooms," which are Internet sites which allow computer users to carry on "conversations" (typed -- not verbal) concerning topics of interest to them. A chat room discussion may be open to the public as a group forum allowing any interested person to participate in, or eavesdrop on, the conversation. From there, individual users may break away for private chats [497].

As even the prosecution acknowledged, lying and role playing is prevalent in Internet chat rooms [760]. A computer user can assume any persona in a chat room [996]. Each user has a "screen name" -- an on-line nickname which is the persona presented by the user to other computer users [498]. Indeed, the primary investigator on the case admitted he had seen role playing at least a thousand times in Internet chat rooms [760]. Using software such as Internet Relay Chat (IRC) software, users can also post a profile of themselves for others to see (although this is not required). This software also allows users to identify someone they are in communication with through the use of two computer commands. The "DNS (domain name server)" command identifies the Internet Service Provider the message was routed through and shows which of the service provider's modems was used to deliver the message. With that information, upon an authorized request the service provider can identify whose account accessed the service provider's modem, although it cannot identify who actually sent the message using that account [498-503, 831]. The "Who Is" command will produce the same information, but may also provide a user profile if one was created [503].

In addition to text communication, graphic images can also be transmitted from one computer user to another. The most common forms of graphic files are either "JPG" or "GIF" files [503-04]. A graphic image is an image composed of hundreds of "pixels" -- essentially small dots which, when combined with many other small dots, make up the graphic image. The color of each pixel is controlled by a hexadecimal (six digit) number assigned to it; the pixel presents a different color depending on how the hexadecimal number is set [992-93].

Because hexadecimal numbers can be manipulated, graphic images can be the product of a graphic artist or can be composites of two or more graphic images. Indeed, software packages which enable computer users to rearrange graphic images by changing the pixel colors are readily available [987-90, 1017]. Today's technology allows any interested person to easily create graphic images which appear to be that of a person, but which do not represent a person in reality [1011, 1016-17]. In fact, the People's main witness, Trooper Mark Williams, admitted that he knew how to alter a graphic image to change its original appearance and acknowledged having altered image files using popular software [737-38].

Dr. Daniel Murphy, appellant's expert witness, explained that there is a five (5) page study which shows a sequence of illustrations to show how to make a natural-appearing graphic file from an inanimate object [1011]. After a cursory review of the printouts of the graphic image files in question, Dr. Murphy was able to point to at least one that may have been altered from graphic files [1015].

Appellant, Thomas R. Foley, Sr., became interested in computers in 1988. An automobile accident caused by a drunk driver (not appellant) left appellant with severe injuries, including a

double skull fracture, broken shoulders, a cracked spine, broken ribs and blood loss. Appellant was in a coma for four days after the accident and was hospitalized for about six weeks. As part of his rehabilitation program, appellant was introduced to computers for purposes of improving mental skills diminished as a result of the accident [1048-49, 1066-70, 1075-78].

After finishing rehabilitation, appellant did not use a computer again until 1995 when his daughter bought him a used computer. Some time thereafter, appellant purchased a modem and software which allowed him to access the Internet. Appellant browsed the Internet for topics of interest to him, such as the NASA, Federal Bureau of Investigation and Federal Communications Commission web-sites. As Chief Engineer at a Lockport radio station, appellant had a particular interest in the FCC web-site. He also used his Internet access to get recipes for his wife of twenty-eight years [1065, 1080-81]. While browsing on the Internet, appellant also discovered that sexual material was available. In fact, graphic image files were posted for anyone to download [1084-85].

During the Spring of 1996, a friend helped him download Internet Rely Chat software which enabled appellant to communicate with other people on the Internet. Towards the end of the Summer of 1996, appellant started eavesdropping in public chat rooms [1077-82]. These sites allowed users to enter a chat room and view or participate in the computer-mediated discussions other people were having related to the chat room topic. The user's computer screen would show the text of these conversations. If so desired, two or more people could move their discussion to a private chat room where their conversation could not be seen by just anyone who entered the public chat room [497].

Eventually, appellant began participating in these chat room

conversations to avoid getting kicked out of the chat room by other participants if he eavesdropped for too long [1087]. His computer was located in the living room of his home and appellant's wife sat just a few feet away from him during these chat sessions [1088-89]. While appellant may have had sexually explicit discussions with others in these chat rooms, he never actually met anyone he conversed with by computer [1089].

New York State Police Trooper Mark Williams was also a computer user -- as part of his job. In March 1993, Williams was assigned to the Computer Crime Unit, which was responsible for investigating the dissemination of child pornography over the Internet [489-90]. At the time of the trial herein, Williams was on a paid suspension as a result of assault and menacing charges filed against him by his wife on May 21, 1996. These charges were adjourned in contemplation of dismissal with the consent of the Oneida County District Attorney -- the same agency which prosecuted appellant below [486-87, 728-30]. The State Police had also conducted a disciplinary hearing regarding Williams' conduct, but no decision had yet been made [487].

Trooper Williams testified concerning five Internet chat discussions he had with appellant during the months of October and November 1996. While approved by his superiors, Williams' Internet activity was not governed by any written protocol. The investigative procedures were developed on an *ad hoc* basis; the only investigative standard limiting Williams' computer investigation was the verbal understanding that, on the first exchange, the police would not initiate contact and that the police would not send child pornography to anyone [756-59].

During the evening of October 27, 1996 and into the early morning hours of the next day, Trooper Williams was working at the Marcy Barracks in Oneida County. Using his on-line persona,

Aimee, Williams entered a chat room entitled "Kids of Family Sex." At approximately 11:37 p.m., Williams claimed that another computer user with the screen name "JustMee" asked him "WEanna (sic) chat sex" [508, 516-18]. A conversation ensued during which Williams portrayed himself as fifteen-year-old Aimee, a sexually active girl who had sex with her father [518-19].

Aimee and JustMee exchanged information. Aimee claimed to be from Utica and, upon learning that JustMee was from Buffalo, said she had an uncle there. JustMee told Aimee that he was fifty-one years old and married with two children [520-23]. The conversation revolved generally around sexual activity. Trooper Williams, as Aimee, described sexual intercourse between Aimee and her fictional father and discussed masturbation with JustMee. JustMee described a fantasy sexual encounter with Aimee and inquired as to whether Aimee might try an older man. Aimee responded, "yes" [519-20, 526, 529-30].

As Williams recalled, at approximately 12:20 a.m., JustMee offered to send Aimee some "preteen fucking pics." Aimee said she would like to see them, so a number of graphic image files were sent [521]. JustMee variously described the files as containing "preteen girls and men," "10 yr old girl on a man," and 12 yr old girl on a (sic) older man." Williams, as Aimee, said, "I like these Kid Sex pics. You get tired of seeing only adult stuff" [523].

During this initial conversation between JustMee and Aimee, Williams used the DNS and Who Is commands to identify JustMee's Internet Service Provider as MicroAge WNY [532-36]. He also added JustMee to his "notify list," a computer function which would let Williams know that JustMee had logged on to Internet Rely Chat [567].

In October and November of 1996, MicroAge of Western New York maintained eighty-five modems. Each of these modems had its own "point-to-point log" which kept track of which customer was using a modem at a given time [817-20]. Daniel A. Kotarski, Vice President of Wizard Communications Systems (which took over MicroAge), identified the account of Thomas R. Foley, Sr., as being connected to one of MicroAge's modems during the October 28, 1996 conversation with Aimee. He admitted, however, that there was no way MicroAge could tell who was using appellant's account or where the user of the account signed on from (the computer could have been in Canada and MicroAge would not have known) [817-32].

Testifying in his own behalf, appellant recalled the events of October 27th to 28th very differently. While Williams claimed that appellant as "JustMee" had initiated the chat discussion, appellant recalled Williams breaking into a conversation he was having with someone else.

On the evening of October 27th, appellant entered the "Daddy/Daughter" chat room and observed only two other participants, Aimee and Redstone. He saw no discussion on his screen, so he assumed that Aimee and Redstone were having a private chat [1090-91]. Appellant then entered a chat room entitled "Kids of Family Sex" and noted a number of other computer users were already there. Seeing someone who identified himself as a father, appellant attempted to contact him for the purpose of arranging a direct chat [1091-92]. A two-finger typist, appellant customarily watched his keyboard as he typed. On this occasion, he contacted the other person and typed, "Hi." When this other individual responded in like fashion, appellant looked down at his keyboard and typed, "wanna chat sex" (after mistakenly typing "weanna"). When he looked up at his screen, however, appellant

saw that Aimee -- rather than the person he had engaged in conversation -- had responded, "yes, w/my father" [1092-93].

Appellant explained that this substitution of parties will happen when a computer user engages in a direct chat with another user and a third party intervenes seeking a private chat. In such a situation, the message intended for the original person contacted will instead go to the intervening third party -- in this case, Aimee [1092-93].

Recognizing that Aimee was not the one he had originally contacted, appellant continued the discussion in light of the responses he received from this persona even though Aimee purported to be a fifteen-year-old girl. Reflecting Trooper Williams' own experience with the Internet, appellant understood that role playing was common in these chat rooms and that if another person was presenting as a female, usually it is actually a male [760, 1094]. Significantly, appellant did not believe that Aimee was actually a teenager who had sex with her father [1095]. He in fact thought that Aimee was a fantasy persona of a male chat room participant -- that the other person was role playing as Aimee [1096-97].

Appellant admitted having a sexually explicit conversation with the individual playing the role of Aimee and also sending graphic image files to that persona. He felt this was just part of what people normally did in this type of chat room, so he did it. Appellant did not, however, communicate with Williams or send graphic image files to him in order to importune Williams (as Aimee) to have sexual contact with him [1099-1100]. Moreover, he had no intention of meeting whoever was Aimee in reality [1101].

The graphic image files transferred by appellant to Williams were sent to appellant by other Internet users. He did not create any

of the graphic images himself and did not obtain them from photographs, videotapes or motion pictures. Further, appellant had never photographed or videotaped anyone engaged in sex [1097-1101].

Immediately after his chat discussion with Trooper Williams ended, appellant was contacted for a private chat by someone using the screen name "Redstone." This user had been in the "Daddy/Daughter" chat room with Aimee when appellant had visited it just before his chat discussion with Aimee. Appellant asked Redstone if he was Aimee's father. Redstone responded "yes" and appellant simultaneously received a graphic file sent by Redstone, who indicated the girl depicted therein in sexual contact with a male (Exhibit 37) was his daughter [1101-04]. Appellant never heard from Redstone again and had no idea who Redstone was in reality [1104-05].

After the October 28th communication, appellant made no attempt to contact Aimee [1105-06]. However, on November 12th, Trooper Williams, as Aimee, saw that appellant was logged onto the Internet and "messaged him directly" for a private chat [567, 570, 787, 1107]. This computer communication between Aimee and appellant began on the evening of November 12, 1998 and lasted into the early morning hours of November 13, 1998. As Williams acknowledged, appellant could not even remember who Aimee was during the initial phase of the conversation [788, 1107-08]. Williams' persona, Aimee, proceeded to engage in a sexually graphic discussion with appellant during which "she" told appellant that she would someday like to have sex with someone besides her father and that she preferred older men. Part of the conversation involved fantasy discussion regarding how Aimee and appellant might have sexual relations if they ever met. During this fantasizing, Williams engaged in role-playing and displayed a graphic imagination [573-602]. Not content to let appellant simply

say what he felt like saying, Williams became an equal participant in the discussion, explicitly detailing the sordid sex life and fantasies of his persona. As Williams put it, he felt he had to be "entertaining" [764].

Just as he did during the first chat session on October 28th, Williams introduced Aimee's fictional aunt and cousins from Buffalo into the conversation [575, 592-93]. Significantly, even though Williams had brought up the subject of Aimee's fictional aunt and uncle from Buffalo, appellant tried to end the conversation so he could go to bed without ever mentioning -- either as fantasy or otherwise -- the possibility of meeting Aimee [575, 592, 1109].

Aimee and appellant also discussed the graphic image file purportedly representing Aimee which Redstone had sent to appellant on October 28, 1996. Appellant then sent this file -- entitled !Teen69.,pg -- to Aimee for the purpose of ascertaining whether she was the girl represented in the image, as claimed by Redstone. Aimee denied she was the female depicted [577, 590-91, 608, 783-85, 1107-09]. During this conversation, which lasted for a couple of hours, appellant transferred no other graphic image files to Williams and made no plans to meet Aimee at any time [510].

The next chat session between Trooper Williams and appellant occurred on November 15, 1996 from 8:28 p.m. to 10:43 p.m. [615]. Although disputed by Williams, appellant recalled that Williams contacted him for a private chat [1119].

During the November 15th communication, JustMee and Aimee shared their fantasies about what turned them on [617]. Shortly into the conversation, Aimee announced that "she" was going to find a map and locate where JustMee lived [620-21]. Appellant also fantasized about what he would like to do with Aimee if they ever met. He did not ask Aimee to meet him and did not

make any specific plans to meet at any time [626-27]. No graphic image files were transferred during this chat session.

A fourth chat session took place on November 20, 1996. The conversation between Aimee and JustMee lasted approximately two hours [653; People's Exhibit 44]. After discussing activities over the previous weekend, Aimee asked JustMee why he had not sent more graphic files. Appellant then sent three graphic image files entitled "pt+teen1.jpg," "pt+teen2.jpg" and "pt+teen3.jpg." He did not, however, know the contents of these files when he transmitted them to Aimee [670-72, 1119, 1169-70; People's Exhibits 47, 48 and 49].

During the November 20th conversation, Trooper Williams adopted the graphic image file sent to appellant by "Redstone" on October 28, 1996 as representing "Aimee" [657-58; People's Exhibit 37]. In addition to general sexual talk, appellant commented that if they ever met, he would like to see Aimee in stirrup pants or leggings [664]. Just a few moments later, Williams then mentioned that she was going to talk to her cousin from Buffalo [664].

Eventually, the discussion turned back to the subject of meeting. To appellant, it was clearly a fantasy; no more than a hypothetical about what they would do together if they ever met. Williams, however, made his character, Aimee, very aggressive, asking JustMee if he would really like to meet and inquiring if JustMee wanted her to see if she could visit her cousin in Buffalo during the holidays [665-66]. While appellant responded "yes" to the Aimee persona, he quickly made it very clear that he might not show up [667].

On November 21, 1996, Trooper Williams obtained a "no knock" warrant from Oneida County Court Judge Barry Donalty authorizing the New York State Police to search appellant's Grand

Island residence [685-87]. The next day, Williams and Investigator Robyn Cadwell traveled to the State Police barracks in Lewiston, New York. They brought along Williams' computer and set it up in the barracks [688-89].

On the evening of November 22nd, Investigator Cadwell and other state troopers placed the Foley residence under surveillance. Williams remained at the barracks and contacted appellant on the Internet. Once he made contact with appellant at approximately 9:23 p.m., Williams notified the other troopers by radio [691-92].

During this last Internet chat session, Aimee and JustMee discussed sex and appellant fantasized about what they could do together if they ever met [693-94]. About an hour later, as JustMee was asking why "Redstone" would send him a picture of Aimee, the troopers executed the warrant at appellant's home [696-97]. Investigator Cadwell was the first to enter the residence and found appellant seated in front of a computer in the living room just to the left of the entryway [856].

Appellant's wife was also in the living room. Cadwell told appellant to step away from the computer and he did. When he tried to call his daughter who was in law school, appellant was placed in handcuffs [858, 1125]. He was then taken to the Lewiston barracks for questioning [864].

While at the State Police barracks, appellant asked if he could call his daughter, Kimberly [908-09, 1130]. Investigator Cadwell dialed the telephone number and spoke to Kimberly before giving the telephone to appellant. Kimberly gave the investigator the name of an attorney in the Buffalo area and his telephone number, but Cadwell maintained that she could not recall being informed that the person Kimberly referred to was an attorney.

Regardless, Cadwell did not give the information to appellant [869, 909-11, 1153].

Thereafter, appellant was asked to sign a four-page written statement prepared by Investigator Cadwell. Although the statement contained a typed Miranda waiver and appellant was given an opportunity to read through the statement, he did so without the benefit of his eyeglasses which he needed for reading purposes [1130-32]. After being informed that he was under arrest for computer crimes, but before he signed the written statement, appellant told Investigator Cadwell that it was not "real porno" [1129]. Appellant thought that what he saw on the Internet were not photographs, and that they did not depict real children or real people. Having never seen photographs of children in sexually-explicit situations, appellant thought that the computer images were composites [1129-30].

As Trooper Williams testified, role playing in Internet chat rooms is prevalent. Approximately 70-80 percent of chat room users are male and it is common for males to play female roles. As Williams noted, a male will get more chat room responses if he pretends to be a female [776]. Similarly, appellant thought Aimee was the female persona of a male chat room user [1095-97]. He never believed that Aimee was an actual fifteen-and-one-half year old female having sex with her father [1095, 1110]. Appellant engaged in these chat discussions for fantasy purposes and never intended to meet Aimee [1099-1101, 1108-09, 1118-21, 1179-84].

POINT I

PENAL LAW §235.22 IS UNCONSTITUTIONALLY OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 8 OF THE CONSTITUTION OF THE STATE OF NEW YORK

A. Introduction.

This case involves the application of New York State's Penal Laws to the exercise of free speech rights on the Internet. Recently, Internet speech activity has become the subject of litigation in several jurisdictions, including New York. Significant to this discussion is the nature of the Internet and its unique characteristics.

As the Supreme Court noted in Reno v. American Civil Liberties Union, 521 U.S. 844, 850, 117 S.Ct. 2329, 2334 (1997), as of 1996 there were approximately 9,400,000 host computers connected as part of the Internet network. At present, approximately 40 million people use the Internet and that number is expected to increase to 200 million by this year, 1999. Id.

The District Court in American Libraries Association v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997), described the Internet in this fashion:

> The Internet is a network of networks -- a decentralized, self-maintaining series of redundant links among computers and computer networks, capable of rapidly transmitting communications without direct human involvement or control. No

> organization or entity controls the Internet; in fact, the chaotic, random structure of the Internet precludes any exercise of such control.
>
> The information available on the Internet is "as diverse as human thought." Every facet of art, literature, music, news and debate is represented. There can be no question that the overwhelming variety of available information includes some sexually explicit materials.

Id. at 164.

Similarly, in American Civil Liberties Union v. Johnson, 4 F.Supp.2d 1029 (1998), the District Court for the District of New Mexico made extensive findings of fact concerning the nature of the Internet prefatory to the granting of an order preliminarily enjoining enforcement of a New Mexico state law essentially identical to New York Penal Law §235.21(3) and §235.22(1). In particular, the Court explained that "[e]lectronic mail, mail exploders, Internet Relay Chat, USENET news groups, web-based discussion groups, and the World Wide Web are available to Internet users world-wide." Id. at 1032. The Court also observed that "[i]t is impossible for speakers using electronic mail, mail exploders, Internet Relay Chat, USENET news groups, web-based discussion groups, and the World Wide Web to determine the geographic location of persons who access their speech." Id. Finally, the District court found that "[v]irtually all speech on the Internet that is available to adults is also available to minors" and that "[t]here are no good faith, reasonable, effective and appropriate actions available to the vast majority of speakers on the World Wide Web to restrict or prevent access by minors to their communications." Id. at 1031-32.

Of the various forms of communication on the Internet, "chat rooms" are the most pertinent to the matter before this Court. As the American Libraries Association Court explained,

> [c]hat rooms allow on-line discussion in real time. Users are able to engage in simultaneous conversations with one or many "occupants" by typing in messages and reading the messages typed by others participating in the chat . . . There are thousands of different chat rooms available "in which collectively tens of thousands of users are engaging in conversations on a huge range of subjects."

Id. at 166 (citations omitted). The Appellate Division below also provided an apt description of a "chat room":

> In a chat room, individuals engage in real-time dialogue, i.e., when a message is typed, it appears almost immediately on the computer screen of other individuals in the chat room. The chat rooms foster an exchange of information or ideas on a particular topic. Two individuals may break away from the main chat room to have a private chat. Individuals in the chat room use "screen names" of their choosing.

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"[S]exually explicit material on the Internet includes text, pixtures and chat and 'extends from the modestly titillating to the hardest core.'" Reno v. American Civil Liberties Union, supra at 853, 117 S.Ct. at 2336 (footnote omitted). Indeed, appellant's Internet expert, Dr. Daniel Murphy, noted that sex-related chat rooms are common on the Internet. Dr. Murphy, a Professor at the

State University of New York Institute of Technology at Utica/Rome and Academic Web Master for the School, explained that during these "hot chats" participants commonly adopt on-screen personas different from the reality of their lives [524, 539-43, 548-50]. Dr. Murphy's observations are mirrored by the findings in People v. Barrows, ___ Misc.2d ___, 677 N.Y.S.2d 672 (1998), where the Kings County Supreme Court in granting defendant's CPL §330.30 motion with respect to his convictions under two indictment counts charging violations of Penal Law §235.22 explained:

> The evidence at trial clearly corroborated the findings of several courts that the Internet is a unique, international, as well as interstate, phenomenon. The live courtroom demonstration established that there is much anonymity, uncertainty and lack of control in using the Internet. Indeed, the Internet offers a "brave new world" of communication which, although as Judge Preska suggests [in the American Libraries case], is analogous in some ways to a railroad, it is really unlike any other previously-regulated form of communication . . . . There is presently no practical way to control the dissemination or receipt of communications. It is not uncommon for an Internet user to receive uninvited commercial or personal solicitations, photographs and other messages from anywhere in the world. Nor is it possible for the "speaker" to control with certainty the route or ultimate destination of his or her message. The standards of propriety are no longer confined to those of a particular geographic or political community.

People v. Barrows, ___ Misc.2d ___, 677 N.Y.S.2d at 681 (1998) (citations omitted).

B. Penal Law §235.22 Is Unconstitutionally Overbroad.

Penal Law §235.22 reads as follows:

> A person is guilty of disseminating indecent material to minors in the first degree when:
>
> 1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
>
> 2. by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

Additionally, certain affirmative defenses to prosecution under, *inter alia*, Penal Law §235.22 are set forth in Penal Law §235.23(3), which reads as follows:

In any prosecution for disseminating indecent material to minors in the second degree pursuant to subdivision three of section 235.21 of this article or disseminating indecent material to minors in the first degree pursuant to section 235.22 of this article, it shall be a defense that:

(a) The defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of actions taken by the minor; or

(b) The defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to materials specified in such subdivision, which may involve any appropriate measures to restrict minors from access to such communications, including any method which is feasible under available technology; or

(c) The defendant has restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number; or

(d) The defendant has in good faith established a mechanism such that the labelling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or

> blocking capabilities to access that material or to circumvent any such screening or blocking.

Laws which are overbroad and threaten the exercise of First Amendment rights are unconstitutional. Broadrick v. Oklahoma, 413 U.S. 601, 93 S.Ct. 2908 (1973). As the Broadrick Court underscored:

> It has long been recognized that the First Amendment needs breathing space and that statutes attempting to restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.

Id. at 611-12, 93 S.Ct. at 2915.

Where legislation is not narrowly draw, "[t]he crucial question then, is whether the ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." Grayned v. Rockford, 408 U.S. 104, 114-15, 92 S.Ct. 2294 (1972). Penal Law §235.22 prohibits a substantial amount of constitutionally protected expression and "presents a significant risk of prosecution for the mere exercise of free speech." People v. Dietze, 75 N.Y.2d 47, 50, 550 N.Y.S.2d 595 (1989).

By its terms, Penal Law §235.22 proscribes certain communications of a sexual nature with minors, but does not require that the Government prove beyond a reasonable doubt that the individual charged pursuant to this statute knew that he was communicating with a minor. Indeed, the Governor's memorandum with respect to his approval of the legislation specifically states:

> The central purpose of the bill -- preventing the dissemination of indecent materials to minors -- would be undercut substantially if the new offenses require proof that the defendant knew he was communicating, or intending to communicate, with a minor. Accordingly such proof is not required -- as is apparent from the defenses created by new subdivision 3 of section 235.23 of the Penal Law, which contemplate criminal liability in the absence of such proof.

Governor's Memorandum on Approving L.1996, ch.600 (September 4, 1996). The Appellate Division in its decision below specifically found that "[t]he statute does not require the People to prove that defendant intended his communication to be received by a minor."

While the Legislature's intent in amending Penal Law §235.21 to add subsection 3 and in creating Penal Law §235.22 was obviously to combat communication of harmful sexual materials to children and pedophilic activity, Penal Law §235.22 does so in a manner which exposes to criminal liability even those who unintentionally address a minor through a sexually-oriented communication. If, for example, an individual sends a non-obscene sexually explicit communication to someone whom he believes is another adult and invites that person to engage in sexual contact with him, but that message is erroneously sent to the wrong E-mail address or the wrong chat room participant, he will still be criminally liable under the statute even though he had no intent to send the communication to a minor. Furthermore, as was discussed during the trial, untold numbers of sexually explicit discussions take place in Internet "chat rooms." Because public chat rooms permit anyone to eavesdrop or participate in conversations taking place therein, a communication between two (or possibly more) adults within a chat room containing content of a nature proscribed by

Penal Law §235.22 will expose the speaker to the potential for criminal prosecution if, unbeknownst to him, a minor is present in the chat room.

A similar situation was addressed by the United States Supreme Court in Reno v. American Civil Liberties Union, supra. There, the Telecommunications Act of 1996 contained provisions intended to prevent the transmission by telecommunications device or computer of obscene, indecent or patently offensive messages to persons under the age of eighteen. In finding the challenged sections unconstitutionally overbroad, the Supreme Court noted that in Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 129, 109 S.Ct. 2829 (1989), the Court had "made clear that the mere fact that a statutory regulation of speech was enacted for the important purpose of protecting children from exposure to sexually explicit material does not foreclose inquiry into its validity . . . that inquiry embodies an 'over-arching commitment' to make sure that Congress has designed its statute to accomplish its purpose 'without imposing an unnecessarily great restriction on speech.'" Reno v. American Civil Liberties Union, supra at 875-76, 117 S.Ct. at 2346-47.

Noting that the Communications Decency Act was a content-based restriction on speech, the Court concluded that the terms "indecent" and "patently offensive" cover "large amounts of non-pornographic material with serious educational or other value." Id. (footnote omitted). The Court rejected the Government's arguments that the Act was narrowly tailored because its provisions criminalized only communications to persons known by the speaker to be under the age of eighteen. Emphasizing that there is no effective way of determining the age of an Internet user, the Court commented:

> This argument ignores the fact that most Internet fora -- including chat rooms, news groups, mail exploders, and the Web -- are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable.

Id. at 880, 117 S.Ct. at 2349. The Supreme Court's determination that there was no reliable way for commercial or non-commercial speakers to ascertain the age of an Internet user led it to conclude, as the District Court had, that "the risk of criminal sanctions 'hovers over each content provider, like the proverbial sword of Damacles.'" Id. at 882, 117 S.Ct. at 2349-50; see also, American Civil Liberties Union v. Johnson, supra [where the United States District Court preliminarily enjoined enforcement of a law prohibiting the dissemination of sexually explicit material via computer to minors on the ground that, *inter alia*, it was substantially overbroad].

An example given by the Supreme Court in Reno to highlight the fallacy of the Government's argument that prohibition of transmissions whenever it is known that one of the recipients is a minor would not interfere with communication between adults has persuasive application in the instant case:

> Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor -- and therefore that it would be a crime to send the group an indecent message -- would surely burden communication among adults.

Reno v. American Civil Liberties Union, 521 U.S. at 876, 117 S.Ct. at 2347.

Similarly, under New York Penal Law §235.22, if, for example, a chat room participant intends to simultaneously send a sexually explicit graphic image file with an accompanying message inviting other chat room participants to get together with him for certain lawful sexual activities (e.g., group sex), he runs a very real risk that one or more minors will be among the innumerable people who have access to the chat room at any given time. While the speaker may not have had any intention of communicating the image or the message to any minor, the communication may still end up on the minor's computer screen, thus exposing the speaker to criminal prosecution.

Notably, Penal Law §235.22 does not contain even the minimum protections which were found insufficient to save the Communications Decency Act from being held unconstitutional on the grounds of overbreadth. Here, the statute does not contain a knowledge requirement which gives any assurance that criminal liability will attach only to those individuals who knowingly have proscribed communications with a minor. To the contrary, the Legislature purposefully excluded knowledge of minority status as an element of Penal Law §235.22. Thus, the grave threat of prosecution is always present for the millions of Internet users who engage in sexually oriented discussions or correspondence, particularly in the thousands of unregulated chat rooms populated by false personas or "screen names."

In affirming appellant's conviction, the Appellate Division took care to point out that Penal Law §235.22 is not similar to the CDA and rejected the applicability of the Reno v. American Civil Liberties Union analysis to the controversy before this Court. Appellant acknowledges that the specific provisions of the CDA at

issue in the Reno case are not identical to the language of Penal Law §235.22, but submits that the reasoning of the Supreme Court in that case has great bearing on the resolution of the issues raised on this appeal. Most notably, though still constitutionally deficient on overbreadth grounds, the CDA contained a scienter requirement regarding the age of the message recipient, a minimal protection and narrowing mechanism which Penal Law §235.22 lacks.

Moreover, the availability of affirmative defenses to prosecution under the statute does nothing to cure the overbreadth of this statute. As the Supreme Court underscored in 1997 (and after the trial in this matter), there is simply no way for a computer user to reliably ascertain the age of an Internet user. Reno v. American Civil Liberties Union, 521 U.S. at 881-82, 117 S.Ct. at 2349-50. In so concluding, the Supreme Court rejected the Government's argument that the overbreadth of the CDA was cured by the inclusion of a scienter element, ruling that an Internet user's inability to effectively determine the age of another Internet user left continuously extant the risk of criminal prosecution regardless of the knowledge requirement. Id. Similarly, the affirmative defense in Penal Law §235.23(3)(a) provides no more protection against overbreadth than the "knowledge" requirement rejected in Reno v. American Civil Liberties Union; arguably, it provides less.

Furthermore, as noted by the Kings County Supreme Court in People v. Barrows, 677 N.Y.S.2d 672 (1998), the "harmful to minors" element set forth in Penal Law §235.22(1) suffers,

> from the same imprecision and overbreadth [as the CDA] in failing to provide a clear and predictable definition of what transmissions will be deemed "patently offensive to prevailing standards" of a universal audience. Were it possible to confine the use of the Internet within the State of New York,

> perhaps the statute would be enforceable, but that is neither possible, as evidenced by the case at Bar, nor, in light of the potential of the Internet, is it desirable to so restrict such communication.

People v. Barrows, 677 N.Y.S.2d 672, 683 (1998). As recognized by the Barrows Court, an intractable dilemma faced by Internet users desiring to transmit ideas which are sexual in nature or contain simulated nudity "is whether such expressions will offend the standards of any community within the vast range of transmission as to what is 'suitable' for children." Id. (emphasis added). In light of the "international, geographically-borderless nature of the Internet's reach, regardless of the speaker's intent," People v. Barrows, supra at 638, application of the "community standards" element of the "harmful to minors" test "means that any communication available to a nation-wide audience will be judged by the standards of the community most likely to be offended by the message." Reno v. American Civil Liberties Union, supra at 875, 117 S.Ct. at 2347. Consequently, because of the nature of the Internet, New York's standard for what is obscene as to children requires that "all Internet communication must, as a practical matter, be tailored to that standard to avoid possible prosecution regardless of the intended audience, thus 'reducing the adult population to only what is fit for children' in violation of the First Amendment." Sable Communications of Cal., Inc. v. FCC, supra at 128, 109 S.Ct. at 2837. The overbreadth of such a provision is, therefore, readily apparent.

The Appellate Division's conclusion that the addition of the "luring" prong (Penal Law §235.22[2]) sufficiently narrows the statute so that communication between adults will not be chilled is meritless. While that might have been the case if the luring prong had required proof of some overt act in furtherance of a predatory objective (such as actually travelling for the purpose of meeting the minor), as it is presently written Penal Law §235.22 permits

prosecution for mere speech, even if the speaker never takes a step toward actually achieving contact with the child beyond what was said in the communication.

The Appellate Division's comment that "[o]nly when an individual sends graphic images to a minor and then attempts to lure that minor into sexual activity does he risk conviction under the statute" ignores the realities of Internet communication recognized by the Reno, American Libraries, ACLU v. Johnson and Barrows Courts and impliedly rests on the assumption that the speaker had knowledge of the underage status of the recipient.

The sweep of Penal Law §235.22 reaches far more protected speech that is constitutionally permissible. Accordingly, appellant respectfully requests that this Court reverse his convictions and dismiss the counts of the indictment charging attempts to violate Penal Law §235.22 on the ground that said statute is overbroad in violation of the State and Federal Constitutions.

POINT II

PENAL LAW §235.22 VIOLATES THE COMMERCE CLAUSE AND IS THEREFORE INVALID

The Legislature created Penal Law §235.22 in an effort to protect children from pedophilia on the Internet. The effect of this legislation, however, reaches far beyond New York's geographical borders and impacts substantially on interstate commerce. This over-reaching violates the Commerce Clause of the United States Constitution and renders the statute invalid. The Appellate Division's decision to the contrary should be reversed.

Article I, Section 8, cl. 3 of the United States Constitution grants Congress the power "[t]o regulate Commerce with foreign

Nations, and among the several States, and with the Indian Tribes." This affirmative grant of authority also has a "negative" aspect; the Supreme Court "has long construed the Clause to imply a corresponding prohibition against State measures that unduly or discriminatorily burden interstate commerce." Homier Distrib. Co., Inc. v. City of Albany, 90 N.Y.2d 153, 158, 659 N.Y.S.2d 223 (1997). This concept is grounded in the "'principle that our economic unit is the Nation, which alone has the gamut of powers necessary to control of the economy.'" C&A Carbone v. Town of Clarkstown, 511 U.S. 383, 401, 114 S.Ct. 1677, 1688 (1994), quoting Hood & Sons v. DuMond, 336 U.S. 525, 537-38, 69 S.Ct. 657 (1949).

Whether a state statute transgresses upon the regulatory power of Congress is determined by reference to a long-established rule: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844 (1970); see also, People v. Concert Connection, 211 A.D.2d 310, 319, 629 N.Y.S.2d 254 (2d Dept. 1995).

A federal District Court has already enjoined the enforcement of Penal Law §235.21(3) which reads identically to subdivision one of Penal Law §235.22, the whole text of which states:

> A person is guilty of disseminating indecent material to minors in the first degree when:
>
> 1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual

> conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; or
>
> 2. by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

In American Libraries Association v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997), the District Court ruled that Penal Law §235.21(3), which criminalizes the communication set forth in Penal Law §235.22(1) above as Disseminating Indecent Material to Minors in the Second Degree, is "closely concerned with interstate commerce, and scrutiny of the Act [Penal Law §235.21(3)] under the Commerce Clause is entirely appropriate." Id. at 173.

Characterizing the Internet as a "borderless world" which transcends states' geographical limits, the District Court concluded that Penal Law §235.21(3) contravened the Commerce Clause in three ways:

> First, the Act represents an unconstitutional projection of New York law into conduct that occurs wholly outside New York. Second, the Act is invalid because although protecting children from indecent material is a legitimate and indisputably

> worthy subject of state legislation, the burdens on interstate commerce resulting from the Act clearly exceed any local benefit derived from it. Finally, the Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether. Thus, the Commerce Clause ordains that only Congress can legislate in this area, subject, of course, to whatever limitations other provisions of the Constitution (such as the First Amendment) may require.

Id. at 169.

Penal Law §235.22 suffers from the same deficiencies. Having incorporated language identical to the constitutionally invalid language of Penal Law §235.21(3), Penal Law §235.22 obviously imported the same problems. See, People v. Barrows, supra ["All of the impediments to constitutionality under the First Amendment that apply to Penal Law §235.21(3) are therefore applicable [to Penal Law §235.22], as are the overbreadth concerns expressed in Reno"].

For example, the American Libraries Court found that the New York State Legislature had over-reached by enacting a law which regulates Internet activity beyond New York's borders. In particular, the Court considered whether the practical effect of Penal Law §235.21(3) was to regulate out-of-state transactions. American Libraries Ass'n v. Pataki, supra at 175-77; see also, Brown-Forman Distillers v. N.Y. State, 476 U.S. 573, 581-83, 106 S.Ct. 2080 (1986) [where the New York liquor price affirmation law was found to violate Commerce Clause because the practical effect of the statute was to regulate liquor prices in other states]. The American Libraries Court concluded that Penal Law §235.21(3) had a chilling

effect on Internet expression outside New York's territorial limits. For instance, the Court pointed to the testimony of a number of witnesses who refrained from engaging in certain interstate commerce because of the existence of the statute. The Court specifically referenced the testimony of a "Web-site" operator who removed several images from his "virtual studio" because he feared prosecution under Penal Law §235.21(3):

> As described above, no Web siteholder is able to close his site to New Yorkers. Thus, even if Mr. Kinsky were located in California and wanted to display his work to a prospective purchaser in Oregon, he could not employ his virtual studio to do so without risking prosecution under the New York law.

American Libraries Ass'n v. Pataki, supra at 174.

A similar difficulty is created by the existence of Penal Law §235.22. Contrary to the reasoning of the Appellate Division, the additional requirement that the speaker importune, invite or induce a minor to engage in certain specified sexual activities does not insulate out-of-state commerce from the effects of the statute.

As observed by the Barrows Court, in the absence of actual physical steps taken to effectuate a meeting (as defendant Barrows took when he entered New York State and approached a young woman whom he believed to be the minor Internet user for the purposes of consummating his intention to engage in prohibited sex with a minor), suggestions during Internet chats which may be interpreted by some as importuning, inviting or inducing a minor to engage in sexual activities are "mere words." Thus, pure speech unaccompanied by overt or provable acts cannot be characterized as "conduct" for the purposes of giving Penal Law §235.22 a narrowing construction in order to avoid a determination that the

statute violates the First Amendment and the Commerce Clause. People v. Barrows, 677 N.Y.S.2d 672, 685 (1998).

The Appellate Division's observation that "we cannot conceive of any legitimate commerce involving the sending of graphic images to minors while at the same time attempting to lure them into engaging in sexual activity," misses the mark. First, the question is not whether the statute will burden commerce intentionally and illicitly directed at children. Rather, the interstate commerce-related concern is that legitimate Internet-based commercial entities which purvey or advertise products and services intended for adults will be caught up in the broad sweep of New York's Internet communication regulations. For example, a Web-site operator in a state which does not require him to restrict or prevent access by minors to sexually-oriented materials on his site and who invites site visitors to contribute sexually-oriented images of themselves to a bulletin board containing advertisements from the web-site's sponsors could face prosecution under Penal Law §235.22 if a New York minor accesses the site and submits a sexually explicit depiction of himself or herself. Moreover, an adult web-site operator who cannot or does not prevent access by minors to his site runs the risk that minors will be exposed to sexually explicit material which could be considered harmful to minors. If, for example, the explicit image is accompanied by text encouraging the viewer to contact a telephone number or web-site address in order to be placed in contact with others sharing similar sexual interests (i.e., a common swingers' connection site or an adult-dating service or personal ads bulletin board), the web-site operator, wherever he is located, could face prosecution under New York law. Such web-sites are by no means uncommon.

Consequently, a commercial web-site operator whose operations are located in another state which does not have proscriptions equivalent to those set forth in Penal Law §235.22 may

find himself unexpectedly facing criminal liability for unintended communications with minors. Indeed, as underscored by the American Libraries Court and by the Supreme Court in Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329 (1997), such circumstances would not come as a surprise given that there is no effective and reliable way to determine the age or geographic location of Internet users. This same concern was voiced in Barrows, where the Court emphasized that "[t]here is presently no practical way to control the dissemination or receipt of communications" on the Internet. People v. Barrows, 677 N.Y.S.2d 672, 681 (1998).

The remaining conclusions of the American Libraries Court concerning the validity of Penal Law §235.21(3) apply equally to §235.22. First, while protection of children from sexual exploitation is undoubtedly a legitimate and important state goal, the local effect of enforcement of Penal Law §235.22 will, for Commerce Clause purposes, be far outweighed by the legislation's negative impact on interstate commerce:

> Balanced against the limited local benefits resulting from the Act is an extreme burden on interstate commerce. The New York Act casts its net worldwide; moreover, the chilling effect that it produces is bound to exceed the actual cases that are likely to be prosecuted, as Internet users will steer clear of the Act by a significant margin.

American Libraries Ass'n v. Pataki, supra at 179. The mere existence of Penal Law §235.22 exports New York's domestic policies into other states (especially its community standards as to what material is appropriate for minors). People v. Barrows, supra.

Finally, Internet communication is unquestionably an area properly susceptible to regulation only by Congress. See, Wabash,

St. L&P Ry. Co. v. Illinois, 118 U.S. 557, 7 S.Ct. 4 (1886) [where, because of the national character of the railroad system, regulation of it was entrusted to Congress rather than the individual states]. As noted in American Libraries, "the Internet is analogous to a highway or railroad." American Libraries v. Pataki, supra at 161. "The Internet, like the rail and highway traffic at issue in the cited cases, requires a cohesive national scheme of regulation so that users are reasonably able to determine their obligations." Id. at 182. In the absence of federal regulation, states will be free to impose conflicting obligations on Internet users. "Without the limitations imposed by the Commerce Clause, these inconsistent regulatory schemes could paralyze the development of the Internet altogether." Id. at 181.

Indeed, as Judge Preska pointed out, even if all fifty states adopted the "harmful to minors" definition utilized by New York, Internet users would still be faced with a myriad of conflicting obligations. The "prevailing community standard" with respect to what is harmful to minors will undoubtedly vary from state to state. Thus, leaving regulation of the Internet to the states even where they have "harmful to minors" definitions identical to New York's will not create the uniformity of treatment necessary to ensure the continued viability and growth of the Internet. Id. at 181-83.

While the American Libraries decision did not specifically address Penal Law §235.22, the reasons set forth there for the invalidation of Penal Law §235.21(3) as a violation of the Commerce Clause are equally applicable to Penal Law §235.22. See, People v. Barrows, supra. Accordingly, appellant respectfully requests that this Court declare Penal Law §235.22 unconstitutional, reverse his convictions for attempted commission of that crime, and dismiss the corresponding counts of the indictment.

POINT III

PENAL LAW §235.22 IS UNCONSTITUTIONALLY VAGUE AND MUST BE DECLARED VOID

One of the fundamental precepts of constitutional law is that "[o]ur Constitution is designed to maximize individual freedoms within a framework of ordered liberty." Kolender v. Lawson, 461 U.S. 352, 357, 103 S.Ct. 1855, 1858 (1983). Restrictions on these individual freedoms imposed by statute must have both a lawful foundation and definiteness and certainty of expression. Id.

Accordingly, a law is unconstitutional if its provisions are so vague and imprecise that persons of ordinary intelligence must guess at its meaning and differ as to its application. Connally v. General Constr. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127 (1926); Coates v. Cincinnati, 402 U.S. 611, 91 S.Ct. 1686 (1971); People v. Cruz, 48 N.Y.2d 419, 423 N.Y.S.2d 625 (1979). This rule stems from the theory that an average person must be given a "reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned v. Rockford, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99 (1972); see also, Pro Choice Network v. Schenck, 67 F.3d 359 (2d Cir. 1994). To this end, nothing less than "adequate warning of what the law requires" will do. People v. New York Trap Rock Corp., 57 N.Y.2d 371, 378, 456 N.Y.S.2d 711, 714 (1982); citing, People v. Cruz, 48 N.Y.2d 419, 424, 423 N.Y.S.2d 625, 627 (1979). Of tantamount importance is the prevention of arbitrary and discriminatory enforcement. If arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. Grayned v. City of Rockford, 408 U.S. at 110, 92 S.Ct. at 2299 (1972); see also, People v. Cruz, supra at 424. As the Supreme Court warned in Kolender:

> Although the [void-for-vagueness] doctrine focuses both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.

Kolender v. Lawson, supra, at 357-58, 103 S.Ct. at 1858.

The potential for pursuit of "personal predilections" by law enforcement officials and jurors is of particular concern where free expression is implicated. The chilling effect created by even the threat of arrest and prosecution or other penalty requires that the Legislature take special care in enacting statutes which burden expressive freedoms. Consequently, when a vague statute touches protected First Amendment speech, as in the instant case, the vagueness doctrine "demands a greater degree of specificity than in other contexts." Smith v. Goguen, 415 U.S. 566, 573, 94 S.Ct. 1242, 1247 (1974).

A. The Terms Purportedly Defining Luring Conduct Are Unconstitutionally Vague.

The vagueness of Penal Law §235.22 arises from paragraph (2), the "luring" prong. Ostensibly intended to prohibit Internet or other computer contact with a minor for the purpose of encouraging such minor to engage in the delineated sexual activity, the statute impermissibly defines the luring conduct in terms of an unduly broad and ambiguous nature.

For instance, a speaker is guilty of first degree dissemination of indecent material to a minor when he uses a computer to violate paragraph (1) of Penal Law §235.22 and, in the same computer communication with a minor, "he importunes, invites or induces a minor to engage in sexual intercourse . . . ." Penal Law §235.22(2). The phrase "importunes, invites or induces" not only fails to provide adequate notice of what is prohibited, it also permits arbitrary and discriminatory application of the law by both law enforcement authorities and jurors called upon to interpret the speech at issue. Indeed, the only other court which has reviewed the constitutionality of Penal Law §235.22 came to the conclusion that one of the statute's main deficiencies is vagueness:

> Given the unique and pervasive nature of the medium, together with the inherent vagueness of the terms "importune," "invite" and "induce" and the equally vague and far-reaching term "for his benefit" used to describe elements of a crime which requires action by a third person, it is apparent that enforcement of Penal Law §235.22 affords the opportunity to insidiously chill virtually all communication on the Internet related to sex, whether protected by the First Amendment or not and regardless of the ages of the discoursers.

People v. Barrows, ___ Misc.2d ___, 677 N.Y.S.2d 672, 686 (1998).

Significantly, in rejecting appellant's vagueness argument and affirming his conviction, the Appellate Division did not address the reasoning of the Barrows Court. The cogency of the Barrows analysis cannot, however, be ignored. As that Court emphasized, the expressive activity regulated by Penal Law §235.22 must be judged in light of its unique nature as pure speech:

> As reprehensible as Defendant's crime is, his actual "conduct," as prohibited by the statute, amounts only to speech in its purest form. The action which the statute seeks to prevent is required to be taken, not by the "speaker," but by the recipient of the message.

People v. Barrows, supra at 685.

The reality of Internet communication is that messages carried across this communications web are both commercial and non-commercial in nature. The non-commercial run the gamut from e-mail and text paging to the creation and maintenance of web-sites full of expressive material, both adult and non-adult in nature.

Among the myriad of Internet uses and activities available, computer "conversations" in chat rooms are very popular. Indeed, as noted in the 1997 American Libraries Association decision, thousands of different chat rooms exist and are frequented by tens of thousands of users. American Libraries Association v. Pataki, 969 F.Supp. 160, 166 (S.D.N.Y. 1997) (citations omitted). Further, as the trial testimony established, those Internet chat rooms allow computer users to assume any persona they desire [996]. Consequently, role playing is prevalent and, as Internet expert Dr. David Murphy explained, role playing in sex-related chat rooms is a common form of Internet entertainment [524, 539-43, 548-50, 760].

Not surprisingly, therefore, an untold number of these sex-related chat room conversations -- also known as "hot chats" -- involve fantasies. The danger of applying of Penal Law §235.22 as it presently exists to such communications is obvious. Because the statute does not require that one charged with its violation have knowledge that the recipient of the communication is a minor, there exists the very real risk that individuals involved in sexually-related

fantasy discussions in these chat rooms or through other modes of computer-assisted communication may find themselves facing prosecution for expressing sexual thoughts or desires which they have no actual intention of ever fulfilling.

Because the act proscribed -- importuning, inviting or inducing -- consists of pure speech without the necessity of proving that the defendant took any overt steps to move the discussion from fantasy to reality (i.e., entering New York State to meet with a minor; making plane reservations; actually arranging transportation for the minor; etc.), an unwitting communication with a minor or with someone the speaker erroneously believes is an adult role-playing as a minor exposes the speaker to criminal liability if a law enforcement agent or trier-of-fact interprets the fantasy discussion as an invitation to engage in proscribed sexual activity.

The crux of the dilemma is that a speaker using the Internet or other computer medium to exchange graphic images of an adult, but not obscene, nature and to communicate sexually-oriented thoughts, ideas or desires, not only runs the risk that the recipient of the message in these unregulated chat rooms is a minor, but also faces the reality that the vagueness of Penal Law §235.22 permits an essentially standardless interpretation of the speaker's words by police officers or jurors applying the broad language of the statute.

The language of the Internet is not simply that of commercial business, contracts or law. Communications among the many millions of people world-wide using the Internet concern a variety of subjects "as diverse as human thought." Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329, 2334, 2344 (1997). Inevitably, many of those subjects relate to human sexuality and eroticism. The strictures of Penal Law §235.22 chill sexually-related expression by failing to give speakers sufficient objective notice of what is prohibited and by permitting

criminalization of pure speech through the varying and standardless interpretive efforts of law enforcement officials and triers of fact.

While the goal of protecting minors from sexual predators who use the Internet as a means of procuring actual sexual contact with children is laudable, the broad brush used to paint those predators threatens the entire canvas of lawful communication of erotic ideas via the Internet. While it is unlawful to exploit children through the creation, distribution or possession of child pornography in New York, it is not illegal to discuss sex or to engage in erotic communication.

New York, however, has hung the threat of prosecution over the heads of those whose erotic discussions on the Internet flow through the State. It cannot be gainsaid that the communication of ideas -- whether sexual or not -- often involves apparent statements of fact. Whether one fantasizes about a romanticized notion of marriage or an ideal vacation or a particular sexual circumstance, when communicated to others such thoughts commonly take form as statements or queries: "I'd love to . . ." or "Wouldn't it be great to . . . ?"

Under New York law, however, assuming the requisites of Penal Law §235.22(1) are met, if the speaker does not realize that the often anonymous recipient of the communication is a minor or erroneously believes -- as part of the fantasy aspect of the discussion -- that the recipient is an adult pretending to be a minor, any discussion of a desire to meet for purposes of sexual intimacy -- even if purely fantastical -- exposes the speaker to prosecution should a police investigator choose to interpret the conversation as evidence of criminal culpability.

Moreover, given the pervasiveness of the Internet today and, in particular, the popularity of sex-related chat rooms, the

threat that Penal Law §235.22 will be applied to lawful speech is ever-present and, consequently, so is its chilling effect. Arguably, construing the statute to require as an element proof of an overt act tending to effectuate an invitation extended to a minor to engage in proscribed sexual activity for his benefit would narrow the sweep of the statute to prohibited conduct rather than mere speech, but such a construction has not been rendered by New York State's appellate courts. In the absence of such a limiting construction, New York will continue to "burn the house to roast the pig." Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 127, 109 S.Ct. 2829 (1989).

Significantly, the Barrows Court did impose such a limiting construction on Penal Law §235.22. There, it affirmed the defendant's conviction under Count 8 of the indictment, noting that the element was satisfied "when Defendant took the additional step of tending to effect the reality of sexual conduct by meeting with Tori in Brooklyn." People v. Barrows, supra at 685. As to Count 7 which alleged only that defendant Barrows induced Tori to masturbate during cyberchat, however, the Court set aside the verdict on grounds of both vagueness and a Commerce Clause violation:

> While such "conduct" would appear to satisfy Paragraph 2 of Penal Law §235.22, given the nature of the Internet, in most cases, the proof that such activity actually took place would be limited to the testimony of the recipient of the transmission. Generally, as was the case with Tori 83, such suggestions are likely to be "mere words" unaccompanied by any overt or provable acts. In those instances in which physical acts have occurred, either in the presence of or with the participation of the Internet speaker, other criminal

> laws are available as an appropriate sanction. To the extent that such communications are practically limited to pure speech, this Court finds they fall within the parameters of Reno in that, both as applied to the particular facts of this case and in light of the nature of the Internet, the statute is unconstitutionally vague in also chilling First-Amendment-protected communications between adults via the Internet. To the extent that such communications involve interstate transmissions, Penal Law §235.22 also violates the Commerce Clause.

Barrows drew the appropriate and definite line between protected speech and proscribed conduct. Requiring that the trier of fact find as an element of Penal Law §235.22 some overt act designed to effectuate the reality of sexual conduct with a minor removes the suspect communication from the realm of "pure speech" protected by First Amendment guarantees and places it into the category of prohibited "conduct."

Penal Law §235.22 is unconstitutionally vague on its face, warranting reversal of appellant's conviction. Furthermore, even judged in light of the proposed narrowing construction, appellant's actions amounted to pure protected speech, not proscribable conduct. Accordingly, appellant's conviction should be reversed and the indictment dismissed or, in the alternative, a new trial should be ordered before a jury properly instructed as to the required narrowing element.

B. The "Sexual Conduct for His Benefit" Element of Penal Law §235.22(2) is Also Unconstitutionally Vague.

Penal Law §235.22(2) prohibits a speaker from using described computer communications to "lure" a minor into engaging in "sexual conduct for his benefit." While "sexual conduct" is defined by Penal Law §235.20(3) as "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if the person be a female, breast, the addition of the phrase "for his benefit" in the context of the computer communications intended to be regulated renders the term as a whole vague.

In the instant case, the People argued to the jury that appellant was guilty of disseminating indecent material to minors in the first degree because he encouraged the fictional "Aimee" to masturbate during an on-line typed chat discussions [1260-61]. Of course, no masturbation occurred because "Aimee" was a character whose role in this Internet fantasy discussion was played by Trooper Mark Williams.

The phrase "for his benefit" is inherently vague, a fact noted by the Barrows Court in ruling Penal Law §235.22 unconstitutional on that ground. Indeed, as noted above, a charge of inducement of a minor to masturbate during a cyberchat was also leveled against defendant Barrows. In vacating the verdict against Barrows on that count of the indictment, the Barrows Court observed that, in the context of the Internet discussions the statute was meant to regulate, "such suggestions are likely to be 'mere words,' unaccompanied by any overt or provable acts." People v. Barrows, supra at 685. Further noting that other criminal laws are available to address those situations where prohibited physical acts have occurred in the presence of or with the participation of the Internet speaker (i.e., the

rape, sodomy, sexual abuse laws, etc.), the Barrows Court concluded that to the extent that the communication alleged as an inducement to "sexual conduct for his benefit" is limited to pure speech, Penal Law §235.22 is unconstitutionally vague.

The point of the Barrows decision is well taken. In the absence of an overt act beyond the "mere words" used in the communication, the law enforcement agent or juror is left to evaluate pure speech without the ability to apply specific and objective standards in order to distinguish between a *bona fide* attempt to lure a minor into masturbation for the speaker's benefit (for example, at a physical meeting where the minor exposes his or her genitals to the speaker and masturbates for his pleasure) and simple fantasy talk where the speaker has no real intention of ever taking steps to meet the minor, which obviously is the ultimate goal of "luring."

Furthermore, although "sexual conduct" is defined by statute, Penal Law §235.22(2) gives no notice that its provisions would criminalize an invitation to a minor to masturbate outside of the presence of the speaker during a cyberchat consisting of non-verbal, typed communication. Indeed, review of the proscribed sexual activities delineated in paragraph 2 suggests leads that Penal Law §235.22 was intended to prohibit only computer communications intended to seduce a minor into the physical presence of the speaker for consummation of a sexual act or to engage in a sexual performance (play, motion picture, photograph or dance; Penal Law §263.15) for the speaker. The standardless discretion afforded police, prosecutors and juries by this statute, however, allows for the pursuit of "personal predilections" -- in this case the inclination to punish appellant's speech insofar as it could be interpreted as an encouragement of on-line masturbation by the fictional character "Aimee." Even though Penal Law §235.22 would not appear to be directed at regulating such a phenomenon,

the imprecision of the terms used in the statute permits arbitrary and discriminatory enforcement of the law because it does not contain the minimal objective guidelines necessary to prevent the "standardless sweep" which is the hallmark of unconstitutionally vague statutes. See, Kolender v. Lawson, supra.

Accordingly, appellant respectfully requests that this Court enter an order reversing appellant's conviction under Penal Law §§110/235.22 and dismissing the indictment.

POINT IV

PENAL LAW §235.22 IS A CONTENT-BASED RESTRICTION ON SPEECH WHICH CANNOT SURVIVE STRICT SCRUTINY

Penal Law §235.22 proscribes certain sexually-oriented communications with minors and imposes criminal sanctions upon speakers who violate its provisions. Appellant submits that the statute is a content-based restriction on expression which cannot survive strict scrutiny because the limitations imposed on protected speech are far too broad for the limited purpose of the legislation. Accordingly, the Appellate Division's decision finding Penal Law §235.22 to be a precisely drawn means of serving a compelling government interest should be reversed.

The first step in any analysis concerning the propriety of government regulation of protected speech is to determine whether the restriction involved is based on the content of the regulated speech or is content neutral. In other words, when a government regulation burdens protected speech, an analysis must be conducted to determine whether it does so because of disagreement with the content of the regulated speech or merely incidentally while serving

purposes unrelated to the content of expression. Boos v. Barry, 485 U.S. 312, 320-21, 108 S.Ct. 1157, 1163 (1988).

Content-based speech restrictions are presumptively invalid and will not survive the applicable strict scrutiny analysis unless the government meets its heavy burden of establishing (1) that the regulation promotes a compelling state interest, and (2) that the government chose the least restrictive means to further the articulated interest. Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126, 109 S.Ct. 2829, 2836 (1989); see also, Simon & Schuster v. New York Crime Victim's Board, 502 U.S. 105, 112 S.Ct. 501 (1991). New York courts consider essentially the same factors when reviewing a content censorship claim. Time Square Books v. City of Rochester, 223 A.D.2d 270, 275, 645 N.Y.S.2d 951, 955 (4th Dept. 1996) (citation omitted) ["Under the State Constitution, like the Federal Constitution, government regulation of speech that is aimed at the message conveyed must clear a high hurdle to withstand challenge. 'Generally speaking, if the regulation is content-based it is presumptively invalid and therefore subject to strict scrutiny'"]. However, the degree of speech protection available under the New York State Constitution is greater than that afforded under the Federal Constitution. As the Court of Appeals has explained, "New York's Free Speech Clause is embodied in article I, section 8. It contains language that is more expansive than its Federal counterpart and we have at times interpreted it in a manner that is more protective of free expression than the First Amendment to the Federal Constitution." Children of Bedford, Inc. v. Petromelis, 77 N.Y.2d 713, 731, 570 N.Y.S.2d 453, 463 (1991) (citations omitted).

In the instant case, Penal Law §235.22 prohibits certain communications between speakers based on the content of the message conveyed and the status of one or more of the participants as a minor. The statute unmistakably restricts computer

communications with minors on the basis of the content of the communication (whether it depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors). As noted in the Governor's Memorandum accompanying approval of the legislation, the central purpose of Penal Law §235.22 is prevention of the dissemination of indecent materials to minors. See, Governor's Memorandum on Approving L. 1996, c. 600 (September 4, 1996). Just as in Reno v. American Civil Liberties Union, supra, this constitutes regulation of speech based on its message and cannot be considered content neutral. Therefore, as the Appellate Division correctly concluded, the Legislature's attempt to protect minors from the direct effects of sexually-oriented expression thus triggers strict scrutiny review.

Protecting the welfare of minors has been recognized as an important government interest. Reno v. American Civil Liberties Union, supra. Appellant does not dispute the validity of the government concern in this general regard, but does question the constitutional propriety of the scope of the speech restrictions imposed by Penal Law §235.22 in relation to its purported objective: prevention of sexual contact between minors and computer pedophiles. The Legislature's failure to employ the least restrictive means of regulating the content of speech in pursuit of its goals requires invalidation of this law.

As discussed in the preceding points, the overbreadth of Penal Law §235.22 is clear and substantial. In the hopes of addressing an important but narrow concern, the Legislature enacted sweeping speech restrictions which quell lawful sexually-oriented speech between adults both within New York and throughout the country. The mere existence of the statute will dissuade adult Internet speakers from engaging in constitutionally protected expression -- which includes even fantasy discussions in Internet chat rooms.

Incorporation of the "luring" element does not save Penal Law §235.22. Far from proscribing mere "conduct" (see, People v. Barrows, 174 Misc.2d 367, 664 N.Y.S.2d 410 [Kings Co. 1997]), the statute criminalizes mere *speech* which can be interpreted as an invitation to a minor to engage in the delineated sexual contact or sexual conduct. People v. Barrows, 677 N.Y.S.2d 672 (1998). Although the defendant in Barrows may indeed have engaged in substantial and provable physical conduct to facilitate his actual meeting with the purported minor (which included traveling to the agreed upon meeting place and asking for the minor), the fact remains that Penal Law §235.22 proscribes the mere utterance of words which may be construed as an invitation to engage in certain sexual activity -- **even if the speaker does not know that he is communicating with a minor**.

Moreover, the Legislature could have accomplished its goal in a much less speech restrictive way. For example, the inclusion of a *scienter* element with respect to the recipient's status as a minor would at least narrow the breadth of expression regulated to only those speakers who knowingly communicated with a minor, although it would not cure the deficiencies noted by the Supreme Court in Reno with respect to the practical inability of non-commercial speakers to avail themselves of the affirmative defenses set forth in the Communications Decency Act, which are similar to the defenses provided for in Penal Law §235.23(3).

Further, other laws are presently on the books which would allow the prosecution of pedophilic activity without the burdens on protected expression imposed by Penal Law §235.22. Rather than criminalizing speech, unlawful sexual activity -- or actual attempts thereat -- can be prosecuted under the same terms applicable to such activity which occurs without the involvement of computer communication. Just as an individual who, either in person or through the use of a telephone, importunes a minor to engage in

prohibited sexual activity and then takes steps to follow through on the inducement to culmination of the activity may face prosecution for various crimes ranging from endangerment to actual or attempted rape, sodomy or sexual abuse (depending on the degree of overt action taken), so too may a perpetrator who uses the Internet to communicate with a minor and then takes action to consummate illicit sexual relations be prosecuted.

The overbreadth of Penal Law §235.22 also creates a rather incongruous situation with respect to computer communications between juveniles and young adults. Penal Law §130.55 (Sexual Abuse in the Third Degree) exempts from prosecution consensual sexual contact between an individual more than fourteen years old and a defendant who is less than five years older than the individual where such sexual contact would otherwise have been deemed non-consensual and criminal by virtue of the individual being less than seventeen years old. Penal Law §235.22, however, would criminalize as a D felony an eighteen year old's attempt to arrange sexual contact with his sixteen year old girlfriend if it occurred during a computer communication with her wherein he also transmitted a sexually explicit image which, although not obscene by adult standards, would be considered obscene with respect to what the adult community thinks is suitable for minors (see, Penal Law §235.20[6])). Thus, while actual consensual sexual contact would not be criminal if arranged in person or over the telephone, merely inviting such contact during a computer communication involving the transmission of an image depicting similar sexual contact between adults could subject that eighteen year old to a felony conviction and imprisonment.

Indeed, under these circumstances, Penal Law §235.22 imposes upon that eighteen year old the same degree of criminal liability attributed to adults who have actual sexual contact with children less than eleven years old or adults who forcibly compel

others to have actual sexual contact (see, Penal Law §130.65 [Sexual Abuse in the First Degree]), even though the computer-using defendant need never have any actual sexual contact with another person and may never do more than communicate a desire to engage in sexual contact. In fact, if the eighteen year old had actual sexual contact with a thirteen year old, he would face no more than a misdemeanor charge (Sexual Abuse in the Second Degree [Penal Law §130.60]). Such disconsonant results are an unsurprising consequence of the overly broad means utilized by the Legislature to achieve a limited objective.

Penal Law §235.22 is a content-based regulation of speech which does not employ the least restrictive means to accomplish its goals. Accordingly, appellant respectfully requests that this Court reverse his convictions for Attempted Dissemination of Indecent Material to Minors in the First Degree and dismiss the corresponding counts of the indictment.

POINT V

PENAL LAW SECTION 263.15 IS OVERBROAD IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS

Before the Appellate Division, Fourth Judicial Department, appellant maintained that the proof supporting his conviction was legally insufficient and against the weight of the evidence because the proof presented did not establish beyond a reasonable doubt that the graphic images appellant was charged with possessing in violation of Penal Law §263.15 represented actual children. Appellant further maintained that unless the Appellate Division ruled that proof of the use of actual children was required in a Penal Law §263.15 prosecution, the statute would be unconstitutionally overbroad.

In its decision, the Appellate Division concluded that the prosecution had submitted sufficient evidence that the graphic images at issue were unaltered pictures of actual children, but the Court did not make any express ruling that proof of the use of actual children in the prohibited performances is a required statutory element. Appellant submits that, in the absence of such a construction, Penal Law §263.15 is fatally overbroad.

In the instant case, if the scope of Penal Law §263.15 is not limited to promotion of sexual performances by actual children, then its sweep will prohibit a substantial amount of constitutionally protected expression. Grayned v. Rockford, 408 U.S. 104, 114-15, 92 S.Ct. 2294 (1972). As the Supreme Court noted in New York v. Ferber, the prohibition of child pornography under New York law is not based on a determination that sexually explicit depictions of children are *per se* obscene; rather, the proscription of sexually explicit depictions of children is intended to preserve the physical and psychological well-being of children who otherwise might be abused during the production of child pornography. New York v. Ferber, 458 U.S. 759, 756-60, 102 S.Ct. 3348, 3354-56 (1982). Indeed, the Ferber Court specifically advised that the test for child pornography is different than the obscenity standard set forth in Miller v. California, 413 U.S. 15, 93 S.Ct. 2607 (1973). In the case of child pornography, "[a] trier of fact need not find that the material appeals to the prurient interest of the average person; it is not required that the sexual conduct portrayed be done so in a patently offensive manner; and the material at issue need not be considered as a whole." New York v. Ferber, supra at 764, 102 S.Ct. at 3358. This is premised on the recognition that while sexually explicit depictions or performances of children are not necessarily obscene, the involvement of children in such productions creates a serious risk of harm to their physical and psychological well-being, which may last long into adulthood given that recorded

images made as a child can survive in circulation for many years. Id. at 756-60, 102 S.Ct. at 3354-56.

However, if Penal Law §263.15 is not construed as requiring the portrayal of an actual child engaging in sexual conduct, the sweep of this regulation of speech extends far beyond the child protective objectives of the Legislature. Constitutionally protected expression of sexually explicit -- but nonobscene -- ideas and images could therefore be suppressed by application of the statute to materials which do not contain depictions of actual children engaged in sexual conduct and which consequently do not cause the adverse effects to real children sought to be prevented by Penal Law Article 263.

In the absence of evidence that the individuals depicted in the graphic images offered in support of the counts charging Promoting the Sexual Performance of a Child are or were real children engaged in actual sexual performances, appellant cannot properly be convicted of such a crime. To hold otherwise is to ignore the very purpose of Article 263: prevention of the physical, psychological and social abuse of children who are exploited during the sexual performances which are at the heart of all true child pornography. Indeed, the Supreme Court in Ferber specifically commented on the risks to actual exploited children, noting that one authority had explained:

> [P]ornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life knowing that the recording is circulating within the mass distribution system for child pornography.

New York v. Ferber, supra at 759 n.10, 102 S.Ct. at 3355 n.10 (citation omitted).

Notably, Congress recently revised the federal child pornography regulations to recognize a distinction between a visual depiction of an actual minor engaged in sexually explicit conduct and a visual depiction which conveys only the impression that a minor is engaged in sexually explicit conduct. On October 30, 1998, Congress enacted the Child Pornography Prevention Act which criminalized the knowing mailing, transport or shipment of child pornography in interstate or foreign commerce. Under federal law, "child pornography" means not only the visual depiction of a minor (any person under eighteen years old [18 U.S.C. §2256(1)]) engaged in sexually explicit conduct, but also any visual depiction promoted, presented or displayed in such a manner as to convey the impression that the depiction is that of a minor engaged in sexually explicit activity. The relevant definitional sections state:

> (8) "child pornography" means any visual depiction, including any photograph, film, video, picture, or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct, where --
>
> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
>
> (B) such visual depiction is, **or appears to be**, of a minor engaging in sexually explicit conduct;

(C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct; or

(D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that it conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C. §2256(8).

As defined by 18 U.S.C. §2256(9), "identifiable minor":

(A) means a person --

(i) (I) who was a minor at the time the visual depiction was created, adapted, or modified; or

(II) whose image as a minor was used in creating, adapting, or modifying the visual depiction; and

(ii) who is recognizable as an actual person by the person's face, likeness, or other distinguishing characteristic, such as a unique birthmark or other recognizable feature; and

(B) shall not be construed to require proof of the actual identity of the identifiable minor.

By its terms, the Child Pornography Prevention Act (CPPA) recognizes that current technology enables the creation of graphic images which appear to be real depictions of minors, but are not. This important societal change is reflected in the legislative history of the CPPA at Pub.L. 104-208, Did.A, Title I, §101(a)(5), *et seq.*:

> (5) new photographic and computer imaging technologies make it possible to produce by electronic, mechanical, or other means, visual depictions of what appear to be children engaging in sexually explicit conduct that are virtually indistinguishable to the unsuspecting viewer from unretouched photographic images of actual children engaging in sexually explicit conduct;
>
> (6) computer and computer imaging technology can be used to --
>
> > (A) alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for unsuspecting viewers to identify individuals, or to determine if the offending material was produced using children;
> >
> > (B) produce visual depictions of child sexual activity designed to satisfy the preferences of individual child molesters, pedophiles, and pornography collectors; and
> >
> > (C) alter innocent pictures of children to create visual depictions of those children engaging in sexual conduct;

(7) the creation or distribution of child pornography which includes an image of a recognizable minor invades the child's privacy and reputational interests, since images that are created showing a child's face or other identifiable feature on a body engaging in sexually explicit conduct can haunt the minor for years to come.

Congress' amendment of Chapter 110 ("Sexual Exploitation and Other Abuse of Children") of Title 18 of the United States Code to encompass altered or wholly computer-generated images purportedly representing minors engaged in sexually explicit conduct is a recognition that prior law prohibiting the sexual exploitation of minors had become antiquated in light of technological advances in imagery which were not possible at the time the federal child pornography statutes were originally drafted to address sexual exploitation of actual children. Similarly, Penal Law §263.15 is a product of the Legislature's concern at the time of its enactment in 1977 that children be protected from the physical, mental, emotional and social harm inflicted on them during and after their participation in the creation of such sexually explicit material. See, New York v. Ferber, supra at 758-59, 102 S.Ct. at 3355 (footnote omitted) ["The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child"]. The advent of technology permitting the creation of fictional representations of children purportedly engaging in sexual conduct which are indistinguishable from real depictions of such conduct moves such fictional images beyond the "hard core" of child pornography intended to be eliminated by the Legislature twenty-two years ago in order to curb actual abuse of the children in the films and photographs. To apply Penal Law §263.15 to graphic images not representative of actual children is to give the statute a sweep never contemplated or intended by its drafters.

Accordingly, appellant respectfully requests that this Court hold Penal Law §263.15 unconstitutionally overbroad and reverse his convictions for Promoting the Sexual Performance of a Child and dismiss the corresponding counts of the indictment.

POINT VI

APPELLANT'S CONVICTIONS FOR PROMOTING THE SEXUAL PERFORMANCE OF A CHILD IN VIOLATION OF PENAL LAW SECTION 263.15 ARE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE

During trial, appellant presented expert testimony from Dr. Daniel Murphy establishing that the sophisticated nature of computer technology today enables computer users to create graphic image files which appear to represent objects or people who exist in reality, but who actually are fictional [1016-17]. For instance, Dr. Murphy pointed out that it is not uncommon to see graphic images where body parts are transposed between images [1014-16]. He also noted that these images can sometimes be created or altered so well that it would be difficult for even an expert to determine whether the image represents an actual object or person in reality or is simply a fictional representation [1014-18].

New York State Trooper Mark Williams, the prosecution's main witness, corroborated Dr. Murphy and testified that he had experience in altering graphic image files through the use of popular software [737-38]. Trooper Williams explained that the state of technology allows people with the proper software to alter a graphic image to place one person's head on another person's body. In fact, he had done so himself and found that it was not hard to do [742-43]. Trooper Williams also candidly acknowledged that it is quite common to find altered graphic images posted on the Internet [741].

At the close of the People's case, defense counsel moved to dismiss the counts charging violations of Penal Law §263.15 on the ground that there was insufficient proof that the graphic images purportedly transferred over the Internet by appellant represented actual children [970]. The trial court denied this motion. On appeal, the Appellate Division found that the evidence was sufficient to establish that the images introduced at trial represented actual children and affirmed appellant's conviction. Appellant submits that this was error requiring reversal of his convictions under Penal Law §263.15 and dismissal of those counts of the indictment.

As the United States Supreme Court explained in New York v. Ferber, 458 U.S. 747, 102 S.Ct. 3348 (1982), Penal Law Article 263 was enacted for the purpose of protecting children from exploitation through sexual performances. The Court took specific cognizance of the legislative findings supporting the enactment of Article 263:

> [T]here has been a proliferation of exploitation of children as subjects in sexual performances. The care of children is a sacred trust and should not be abused by those who seek to profit through a commercial network based upon the exploitation of children. The public policy of the state demands the protection of children from exploitation through sexual performances.

New York v. Ferber, supra at 757, 102 S.Ct. at 3355, quoting 1977 N.Y. Laws, ch. 910, Section 1 (footnote omitted). The New York State Court of Appeals has also specifically recognized that the purpose of the adoption of Article 263 of the Penal Law was to "eliminate the child abuse inherent" in the production of child pornography. People v. Keyes, 75 N.Y.2d 343, 348, 553 N.Y.S.2d 81, 84 (1990).

The proof adduced at the trial below was insufficient in that the People failed to establish that the images appellant allegedly transmitted over the Internet to Trooper Williams constituted child pornography within the proscriptions of Penal Law Article 263. Dr. Murphy's expert testimony, establishing that the sophistication of today's computer image manipulation and creation software easily permits the creation of fictional representations which appear to depict objects which exist in reality or which allow for the alteration of depictions of objects which actually do exist in reality to form fictional graphic representations, was essentially uncontroverted at trial. Thus, the proof presented gave no reasonable basis upon which the jury could conclude that the graphic image files before them contained images of real children engaged in actual sexual performances.

Significantly, as emphasized by Dr. Murphy, simple visual review of the graphic images themselves or photocopies of such images cannot reliably determine which, if any, graphic image files contain depictions of real children engaged in sexual performances. Any particular image could be a composite of graphic image files which do not portray a child in reality or could be simply an original work of a computer artist. All it takes is readily available software which allows one to manipulate the hexadecimal numbers which control the coloration of the pixels [987-93, 1011, 1016-17].

Under these circumstances, such fictional creations should not be considered a basis for prosecution pursuant to Penal Law §263.15. The possession or production of images which do not represent real children engaged in actual sexual performances causes none of the physical, psychological or social harms to children which Article 263 was enacted to prevent. Indeed, the existence of such images does no more harm to a child than cartoons, drawings or paintings which do not depict a sexual performance by an actual child.

Penal Law §263.15 prohibits the knowing promotion of "any performance which includes sexual conduct by a child less than sixteen years of age." As the legislative history and judicial interpretation of this statute clearly demonstrate, it is intended that the child therein referenced be an actual existing child or a child who was in existence and engaged in the sexual performance depicted. In light of the proof submitted in the instant case, it cannot be said that each of the elements of the crime had been established beyond a reasonable doubt. People v. Wong, 81 N.Y.2d 600 (1993); see also, People v. Hawkins-Rusch, 212 A.D.2d 961 (4th Dept. 1995). Appellant therefore respectfully requests that his convictions for violation of Penal Law §263.15 be reversed and the corresponding counts of the indictment be dismissed.

POINT VII

THE TRIAL COURT'S RESTRICTION OF CROSS-EXAMINATION BY APPELLANT DENIED APPELLANT'S CONSTITUTIONALLY PROTECTED RIGHT AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 6 OF THE NEW YORK STATE CONSTITUTION

The State and Federal Constitutions guarantee the right of an accused in a criminal prosecution to be confronted with all witnesses against him. A defendant's right to cross-examine any and all witnesses is secured by the same confrontation clause. In the instant case, the trial court improperly limited the defendant's opportunity to cross-examine the key witness for the prosecution, causing extreme prejudice to the defendant.

Of all the fundamental rights guaranteed by the State and Federal Constitutions, the right of a defendant in a criminal case to confront witnesses against him through cross-examination is the

most basic. People v. Chin, 67 N.Y.2d 22, 29, 499 N.Y.S.2d 638, 643 (1986); see also, Davis v. Alaska, 415 U.S. 308, 94 S.Ct. 1105 (1974) [cases construing the confrontation clause hold that a primary interest secured by it is the right of cross-examination (citations omitted)]; and Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973).

In the case at bar, State Trooper Mark Williams, the prosecution's key witness, testified that he was an alcoholic and had been since the age of five (5). On cross-examination, defense counsel inquired into Williams' consumption of alcohol:

> Q: Well, I know you've admitted that you're an alcoholic. Did you used to drink on the job when you worked as a State Trooper?
>
> MR. WEBER: Objection.
>
> THE COURT: Sustained. You don't have to answer that question. Move on to your next area, Mr. Miga.
>
> MR. MIGA: I think the record should reflect that I was foreclosed from inquiry into this area.
>
> THE COURT: It will. As soon as I sustain the objection, that will be on the record. Continue.
>
> MR. MIGA: Thank you very much. So, you're foreclosing me from any further inquiries --

THE COURT: In that area, yes.

MR. MIGA: -- in regard to his drinking alcohol and being on the job drinking?

THE COURT: That's correct. Continue.

Q: Do you recall the events of October 27th and October 28th of 1996?

A: That's -- One of them was a chat log, and one was an arrest.

Q: Okay. Could you answer my question?

A: Yes, I do.

Q: Okay. Had you been drinking before you reported to duty on October 27th, 1996?

MR. WEBER: Objection.

THE COURT: Overruled. Answer the question.

A: Absolutely not.

A witness' capacity to accurately perceive and recall specific events goes directly to the credibility of the witness. For instance, if that capacity is jeopardized by a drug addiction, cross-examination concerning that addiction is freely permitted. See, People v. Brown, 162 A.D.2d 695, 557 N.Y.S.2d 117 (2d Dept. 1990) [where the trial court properly allowed defense counsel "more than ample latitude" in cross-examining a witness with respect to his use of cocaine]. The Supreme Court has held that: "Cross-examination is

the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach." Davis v. Alaska, 415 U.S. 308, 315, 94 S.Ct. 1105, 1110 (1974); see also, People v. Chin, supra.

Defense counsel properly sought to inquire into Williams' alcohol addiction in order to test Williams' capacity as an observation witness and to impeach him where appropriate. Consequently, counsel should not have been prohibited from questioning Trooper Williams with respect to any on-duty use of alcohol. The trial court's refusal to permit this inquiry deprived appellant of the opportunity to establish whether Williams' ability to recall specific events during the course of his investigation was compromised to any extent by on-the-job use of alcohol.

Contrary to the Appellate Division's decision, it was not improper for defense counsel to seek to cross-examine Trooper Williams concerning his on-the-job consumption of alcohol. The on-duty use of alcohol generally by a law enforcement officer seriously affects his credibility. Moreover, the use of alcohol on-duty also specifically implicates Trooper Williams' ability to perceive and recall important events in this case. See, People v. Freeland, 36 N.Y.2d 518, 525, 369 N.Y.S.2d 649, 653 (1975). For instance, regarding the nights of October 27th and 28th, appellant and Williams each testified that the other had initiated contact while on-line; the same dispute occurred for November 15th. Williams admits that he initiated contact as Aimee with appellant on November 12th and 20th [567, 570, 615, 787, 1105-07]. Whether appellant initiated contact with Trooper Williams on the dates in question bore directly on the appellant's claim of entrapment, as well as on the issue of who caused the

communications to be made. While trial counsel did interject one question concerning Trooper Williams' alcohol use on the night of October 27th, it is clear that the trial judge had precluded him from pursuing this line of questioning and had pressed counsel to move off the issue [732-33].

In light of the significance of Trooper Williams' testimony, it was an abuse of discretion for the trial court to preclude trial counsel from inquiring into the investigator's on-the-job use of alcohol. Accordingly, the decision of the Appellate Division, Fourth Department, affirming appellant's conviction should be reversed and a new trial should be ordered.

POINT VIII

THE PROSECUTION FAILED TO ESTABLISH AN UNBROKEN CHAIN OF CUSTODY FOR CRUCIAL PHYSICAL EVIDENCE

The trial court erred in admitting into evidence a computer disk containing files concerning Trooper Williams' investigation of appellant. The disk contained, *inter alia*, a record of all Internet communications between Williams and JustMee. At trial, the prosecution failed to establish an unbroken chain of custody with respect to this evidence. The Appellate Division ultimately held that the computer disk was properly admitted into evidence. Appellant submits that the Appellate Division decision is in error and that his conviction should be reversed and a new trial should be granted.

The computer disk in question (People's Exhibit 1) was held in a locked evidence room at the Marcy Barracks' Computer Crimes Unit until about the second week of June 1997, at which time the evidence was placed with the personal belongings of Trooper Williams [512-13]. Trooper Williams remained in possession of the computer disk at his home from that time until November 18, 1997,

the day immediately prior to his testimony. During this entire time, Trooper Williams was suspended from the Department [486-87, 513].

Trooper Williams testified that other members of the Computer Crimes Unit packed up his personal belongings, inadvertently including the disk in question [513]. The prosecution failed to offer the testimony of the other members of the Computer Crimes Unit, creating a gap in the chain of custody.

The authenticity and accuracy of evidence is established by showing, first, that the evidence is identical to that involved in the crime and, second, that it has not been tampered with. People v. Julian, 41 N.Y.2d 340, 341, 392 N.Y.S.2d 610, 612 (1977); see also, People v. McGee, 49 N.Y.2d 48, 424 N.Y.S.2d 157 (1979). When an item offered as evidence is capable of being replaced or altered, admissibility generally requires that all those who have handled the item identify it and testify to its custody and unchanged condition. People v. Connelly, 35 N.Y.2d 171, 175, 359 N.Y.S.2d 266, 269 (1974) (citations omitted).

Failure to establish a chain of custody may be excused where the circumstances provide reasonable assurances of the identity and unchanged condition of the evidence. People v. Julian, 41 N.Y.2d 340, 345, 392 N.Y.S.2d 610, 613 (1977). It is reasonable to assume that each member of the Computer Crimes Unit is, at a minimum, computer literate. Indeed, Trooper Williams testified that any computer literate person, including himself, has the ability to change anything in the disk [517]. These circumstances fail to provide reasonable assurances of the identity and unchanged condition of the evidence. Id.

Moreover, Williams had control of the disk in question during his suspension. The disk was kept at his home in a closet

[514, 517]. The fact that the evidence was or might have been accessible to others not called as witnesses casts suspicion on the integrity of the evidence. People v. Snyder, 90 A.D.2d 894, 456 N.Y.S.2d 536, 537 (3d Dept. 1982), citing, People v. Connelly, 35 N.Y.2d 171, 175, 359 N.Y.S.2d 266 (1974). The evidence was kept in a household closet to which all members of the household and their guests had access. Trial testimony failed to provide reasonable assurances that the evidence had not been tampered with while it was stored at Williams' home. Additionally, it cannot be said that the disk was safely under police control since Williams was suspended from duty during the time he had possession of the disk. See, People v. Julian, supra.

Although generally breaks in the chain of custody go to weight rather than admissibility, some gaps have resulted in suppression of the evidence. People v. Snyder, 90 A.D.2d 894, 456 N.Y.S.2d 536 (3d Dept. 1982). In Snyder, the Third Department found that since there was conflicting testimony surrounding defendant's condition at the scene, the blood sample taken from the defendant became the most significant and crucial evidence. The Court held that the fact that the blood sample was unsealed and kept in two households in unlocked refrigerators for two days, together with the fact that there was no testimony as to the sufficiency or identity of the preservative used in the sample, rendered the evidence inadmissible. People v. Snyder, 456 N.Y.S.2d 536, 537-38.

The proffered computer disk should not have been admitted into evidence. The disk contained crucial and alterable graphic image evidence and without testimony regarding the chain of custody of the disk there is no way of knowing whether the disk proffered was identical and whether it had been tampered with. Accordingly, appellant respectfully requests that this Court reverse

the decision of the Appellate Division, Fourth Department, and grant appellant a new trial.

CONCLUSION

Appellant requests that this Court reverse the decision and order of the Appellate Division, Fourth Department, affirming his convictions and dismiss the indictment or, in the alternative, grant him a new trial.

DATED: November 4, 1999

Respectfully submitted,

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
PAUL J. CAMBRIA, JR., ESQ.
ROGER W. WILCOX, JR., ESQ.

By /s/
ROGER W. WILCOX, JR.

Attorneys for Defendant/Appellant
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

To be Argued By: William M. Weber, Esq.
Time Requested For Argument: 30 minutes

STATE OF NEW YORK COURT OF APPEALS

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff-Respondent,
vs.
THOMAS R. FOLEY, SR.,
Defendant-Appellant.

ONEIDA COUNTY
INDICTMENT NO. 97-158

ONEIDA COUNTY
INDEX NO. CR 97-224

APPELLATE DIVISION, FOURTH DEPARTMENT
DOCKET NO. KA 98-2083

BRIEF FOR PLAINTIFF-RESPONDENT

MICHAEL A. ARCURI, ESQ.
Oneida County District Attorney
Oneida County Court House
Elizabeth Street
Utica, New York 13501
315/798-5766

DATE: DECEMBER 16, 1999

WILLIAM M. WEBER, ESQ.
Assistant District Attorney
Of Counsel

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STATEMENT OF FACTS

A. Introduction. In June of 1996, the New York State Police established a Computer Crime Unit at their barracks located in Marcy, New York (R489-490). The purpose of the unit was to investigate computer crimes, including the transmission of child pornography over the internet and the contacting of children over the internet for the purposes of sexual abuse (R490). The unit initially consisted of one police officer, Trooper Mark Williams, and a computer with a modem (R490-491). Trooper Williams used the computer and its modem to access the internet and conduct his investigations (R491).

Trooper Williams initially spent several months observing what was occurring in the chat rooms" on the internet (R494-495). By means of a process called "Internet Relay Chat" (hereafter IRC), individuals can "chat" with other internet users in real time by typing at their keyboards. Each "chat room" has a name indicative of the topic of conversation going on in the room. Trooper Williams observed the chats going on in rooms with names like "Kids of Family Sex", "Daddy/Daughter Sex", and "Preteen Fuck Pies". His purpose was to learn the language of these people so that he could communicate with them on their level and so that he would not be recognized as a police officer (R494-495).

During his investigation, Trooper Williams used a program called "MIRC" (R496-497). Using this program, in addition to chatting with a group of people by means of IRC, Trooper Williams could also communicate privately with an individual by means of a process called "Direct Connection Chat" (hereafter DCC) (R497). Further, by means of MIRC, or a similar program, it is possible to send to someone with whom you are chatting a computer graphic file. Typically, computer graphic files exchanged via the internet are in either "jpg" or "gif" format

(R503-504). In addition, using MIRC an exact transcription of a chat can be saved as a text file. This called a "chat log" (R504-505).

Trooper Williams also had purchased and used a program called "SnagIt". This program allowed him to take a "digital snapshot" of whatever was on his screen at any given time (R505-506). Trooper Williams stored all the evidence he collected during his investigations-that is, jpg or gif files, chat logs, SnagIt images-on a "Zip" disk, a removable 3V2 inch disk capable of storing approximately 100 megabytes of data (R506-507).

B. <u>The First Chat Session - October 28, 1996</u>. On October 28, 1996, Trooper Williams logged onto the internet and began an IRC session using the screen name of "aimee_" (R507-508). "Aimee_" entered a chat room with the title "Kids of Family Sex" and noticed that there were several individuals in the room (R509). One of the individuals in the chat room was defendant using the screen name of "JustMee" (R509, 918, People's Ex. 61). Defendant and "aimee_" engaged in a conversation that lasted a couple of hours (R509-510). Trooper Williams kept a log of the chat session (R514, 518-530, People's Exh. 2).

(All the times listed below refer to the times indicated on People's Exhibit 2.)

The chat session began at 23:27 by defendant stating to "aimee_", "WEana [sic] chat sex?" Early in the chat, at 23:47, "aimee_" identified herself as a 15 year old female who had had sex with her father (R519). The chat was almost exclusively about sex.

During the chat session, defendant turned the conversation towards meeting with "aimee_" for the purpose of having sex. At

0:44, defendant asked, "NO, IM 5 1, is that too old for you?" (R523). At 1: 19, defendant stated, "Would you like to know how I would have sex with you?" (R526). Defendant then described how he would have sex with "aimee_" (R526527). At 2:07, defendant asked, "Could you try an older man?" (R530). At 2:08, defendant followed up the question with, "But whats the chance of you meeting one you have sex with?" (R530).

During the chat session, defendant encouraged "aimee_" to masturbate. At 23:5 1, defendant asked, "Do you masturbate?" (R519). At 0: 19, defendant asked, "What do you masturbate over?" (R521). At 0:20, defendant asked, "Would you like some pic's to masturbate over?" (R521). At 0:23, defendant asked, "Are you going to masturbate tonight?" (R522). At 0:43, defendant asked, "RU rubbing your clit?" (R523).

During the chat session, defendant transmitted to "aimee_" twenty-nine (29) computer graphic files depicting persons engaged in sexual activity (R546-565, People's Exhs. 5-33). Many of these images depicted children under sixteen years of age engaged in sexual activity (R720-726, People's Exhs. 5, 8, 10, 15, 17, 18, 19, 21, 22, 23, 24, 26, 27, 29, 30, 31 and 32). Defendant initiated the conversation about pictures or "pics." At 0:06, defendant asked, "Do you have any pics?" (R520). At 0: 17, defendant asked, "Hey have you seen pic's of couples having sex?" (R521). At 0:20, he asked, "Would you like some pic's to masturbate over?" (R521), and at 0:21, stated, "I'll send some preteen fucking pic's, OKT' (R521).

While sending the pictures, defendant commented on the substance of the images, demonstrating that he was fully aware of their character and content. At 0:23, defendant stated, "Here are a few preteen girls and men" (R521-522). At 0:36, he stated, "This one is a 10 yr old girl on a man" (R522) and at 0:39, stated, "This one is a 12 yr old girl on an older man" (R523).

The chat session ended at about 2:14 a.m. on October 29, 1996, with both parties indicating that they would stay in touch (R530).

C. <u>The Second Chat Session November 12, 1996.</u> On November 12,1996, Trooper Williams once again logged onto the internet and started an IRC session using the screen name of "aimee_" (R567-570). Trooper Williams had added the screen name "JustMee" to his notify list and, after logging on, observed that defendant was also logged on (R566-567). The chat that ensued did not occur in a chat room, but was a Direct Connection Chat (DCQ. Trooper Williams kept a log of this chat session (R570, 573-602, People's Ex. 34).

(All the times listed below refer to the times indicated on People's Exhibit 34.)

The chat session began at about 23:07 by "aimee_" stating, "Hl!" (R573). Very early in the chat "almee_" reiterated that she was 15 years old. At 23:15, defendant asked, "Your 157 (R574). "Aimee_" responded, "hey u remembered that right:-)" (R574). After getting reacquainted, a several hour chat followed that was once again almost exclusively about sex.

Once again, defendant turned the conversation towards meeting with "aimee_" for the purposes of having sex. At 23:40, defendant asked, "Im 51. Would you do it with me if we met?" (R578). At 23:41, defendant asked, "Would you like me on top or would you like to be on top?" (R579). At 23:44, he asked, "Id like to do it in a car and have someone watching. Would you mind?" (R579) and at 23:56, stated, "Id like to have you wear the stirup pants and I the same and dry fuck!!" (R581). At 0:00, defendant stated, "I know we could have some very good times:))" (R58 1) and at 0: 17, stated, "Id Love to make long passionate love to you!!!" (R583). And so on, *ad nauseum.*

Later, defendant began asking "aimee_" about coming to the Buffalo area to meet with him for sex. At 1:25, defendant stated, "I wish you could cum to the falls" and Id love to make out with you" (R592). At 1:27, defendant asked, "have any plans to come this way?" (R593). Thereafter, a discussion ensued regarding how "aimee_" could get a ride to Buffalo and regarding exactly where defendant lived in the Buffalo area (R592-593). No definite plans were made, however.

As in the first chat session, defendant encouraged "aimee_" to masturbate. At 23:37, defendant asked, "How much do you masturbate?" (R578). At 23:39, defendant stated, "Yep your safer masturbating" (R578). At 0:30, defendant asked, "How do you masturbate?" (R585). At 0:56, he asked, "Are you masturbating?" (R588) and at 1:42, asked, "Did you orgasm to night [sic] yet?" (R595).

During this chat session, defendant transmitted only one computer graphic file to "aimee_" (R610-61 1, People's Exh. 37). This was an image that defendant mistakenly believed was "aimee_" (R590-591). Defendant indicated that he was aware of the character and content of the file by stating, at 1:08, "1 really think he sent me your pic blowing him while he ate you" (R590). Because defendant believed that "aimee_" was only fifteen years old, that means he believed the girl depicted in the image was the same age.

This second chat session ended at about 2:27 a.m. on November 13, 1996, with both parties, once again, indicating that they would stay in touch (R602).

D. <u>The Third Chat Session -November 15,1996</u>. On November 15, 1996, Trooper Williams once again logged onto the internet and began an IRC session using the screen name of "aimee_" (R614-616). On this occasion, defendant, using the

screen name of "Justmee", contacted "aimee_" by Direct Connection Chat (DCC). Trooper Williams kept a log of this chat session (R615, 616-633, People's Exh. 41).

(All the times listed below refer to the times indicated on People's Exhibit 41.)

The chat session began at about 20:28 by defendant stating, "Hi!!!!!!! " (R616). At 20:31, defendant turned the conversation to sex by asking, "Have any sex in the past two days?" (R617). When "aimee_" did not respond, defendant persisted by asking: "Hey, how's sex lately??" (R617). Defendant followed that question with, "Hey lets talk about what we like or turns us on? OKT' (R617). What followed was, once again, a two hour conversation almost exclusively about sex.

Please note that during this chat Trooper Williams reiterated that "aimee_" was only fifteen years old. At 20:52, "aimee_" stated, "that was bout [sic] 9 months ago" and "I was 14 then" (R620).

Once again, defendant continued to discuss meeting with "aimee_" for the purposes of having sex. At 20:40, defendant stated, "Id like to go to a parking area and have you feel me with a girl watching in her car" (R618). Defendant began to describe in detail his location to "aimee_." At 20:58, defendant asked, "Did you ever go to the Falls?" (R621). After "aimee_" indicated that she had been to the falls, defendant explained, "You went over two bridges before the Falls, I live near the first one" (R621). After "aimee"'s response indicated that she had misunderstood, defendant stated, "No [sic] on the 1190 you went over two bridges just before the [sic] falls" (R621). At 21:01, defendant stated, "The first time you crossed the river" and "That's whereirn [sic] at" (R621).

Later in the chat session, the defendant began to talk about making plans to actually meet with "aimee_". At 21:50, defendant stated, "I wish we could meet. I know we could have a good time" (R626). At 21:51, defendant stated, Id [sic] love to have you stradle me facind me in a car and french kiss" (R627). Noting the need for secrecy, at 21:5 1, defendant stated, "We woul [sic] have to be very care full" (R627). At 21:52, defendant said, "Who would you come here with?" and "We would hav eto [sic] meet some place" (R627). After Trooper Williams indicated that "aimee_" had cousins in Buffalo, at 21:53, defendant asked, "Yes butwould [sic] they keep a secret?" (R627). At 21:54, defendant said, "Where do the [sic] live in Buffalo?" and "We would have to make prearrangements" (R627).

Although no computer graphic files were transmitted by defendant to "aimee_" during this chat session, defendant did discuss some of the previously sent files with "aimee_", thereby demonstrating his awareness of their character and content. At 22:06, "aimee_" stated, "i was just looking at some of those pics u sent while back" (R629). At 22:07, defendant asked, "Whats your favorite?" (R629). At 22:07, "'aimee_" answered, "i like yngl jpg and daddycjpg" (R629, People's Exhs. 30 and 27). At 22:10, defendant commented, "I think the girl looks like 10. What do you think?"(R629). At 22:13, defendant commented, "I did'nt [sic] know a girl that young and small could take a hard on that bigso [sic] deep" (R630). At 22:15, defendant stated, "gl [sic] have some that the boy and girl are 10 or younger" (R630).

During this chat, defendant revealed the true danger that he posed to children, if it were not already readily apparent. At 21:41, the following exchange occurred:

[21:41] <Justmee> i lik eyoun [sic] girls
<aimee_> how young would you go
[21:42] <Justmee> Im not on incest now

[21:42] <Justmee> 10
[21:42] <Justmee> if she was good looking
(R626).

The third chat session ended at about 22:42 p.m. on November 15, 1996, with both parties promising to stay in touch (R633).

E. <u>The Fourth Chat Session November 20, 1996.</u> On November 20,1996, Trooper Williams once again logged onto the internet and began an IRC session using the screen name of "aimee_" (R650-651). On this occasion, defendant, using the screen name of "JustMee", contacted "aimee_" by Direct Connection Chat (DCC). Trooper Williams kept a log of this chat session (R651, 653-669, People's Exh. 44).

(All the times listed below refer to the times indicated on People's Exhibit 44)

The chat **session began at about 23:01 by defendant** stating, "Hi!!" (R653). At 23:09, defendant turned the conversation to sex by asking, "Well did you get a chance to masturbate?" (R654). What followed was, once again, a two hour conversation almost exclusively about sex.

During the chat session, the fact that "aimee_" was only fifteen years old was once again made clear. At 0:04, the defendant asked, "you turn 16 next summer?" (R661). "Aimee_" responded, "yep" (R661).

During this session, defendant continued to discuss meeting with "aimee" for sex. At 0:25, defendant stated, "If we ever meet. Id like to see you in stirup pants or legings" (R664). At 0:30, defendant asked, "Do you think if we met, we could fool around asnd [sic] she would'nt mind being in the same car?"

(R664). At 0:32, defendant stated, "If we should ever meet, I would like you to be very vocal. Guys like to know when a girl feels good down there" (R664). At 0:35, defendant stated, "We would hav eto [sic] meet at night at a parking area" (R665). At 0:36, defendant stated, "We would have to make arangements ahear [sic] of time" (R665). At 0:40, defendant asked, "Do you think your cousin would mind if I touched you both?" (R666). At 0:45, defendant stated, "If we ever meet don't beafraid [sic] to put your hand between my legs" (R666).

Defendant and "aimee_" actually began to discuss meeting over Thanksgiving weekend, which was the upcoming weekend. At 0:44, "aimee_" asked, "want me to see when i can come out, maybe over holidays to stay with her" (R666). At 0:46, defendant responded, "Yes, Thanksgiving day week end" (R666-667). At 0:49, defendant stated, "I'll try real hard to meet you but don't be mad if something goes wrong. OK/" (R667).

During this chat session, defendant continued to encourage "aimee_" to masturbate. At 23:09, defendant asked, "Well did you get a chance to masturbate?" (R654). At 23:29, defendant asked, "Have you ever used a vibrator or dildo?" and "Do you ever put anything into your vagina?" (R656-657). At 0:50, he asked, "Hey when did you masturbate last?" (R667).

During the chat session, defendant transmitted to "aimee_" three (3) computer graphic files depicting persons engaged in sexual activity (R670-675, People's Exh. 47-49). All three files depicted *children* engaged in sexual activity (R726). Defendant initiated the conversation about pictures or "pics." At 23: 10, after asking "aimee_" if she had had a chance to masturbate, defendant asked, "What pics did you look at?" (R654). At 23:12, the following exchange occurred:

[23:12] < JustMee > oooohhh!!! Bonner [sic] city!!!
[23:13] < JustMee > Check these out
< aimee_ > neat thanks
< aimee - > how long did it take ya to get all these
[23:14] < JustMee > These are very young kids doing it (R654).

Defendant's statement at 23:14, above, indicates that he was aware of the character and content of the files. In addition, at 0:39, defendant asked, "Did you like those new pics/" (R666). At 0:40, defendant followed with, "They are very young, arnt [sic] they?" (R666).

This chat session ended at about 1:03 a.m. on November 21, 1996, with both parties indicating that they would stay in touch (R669).

F. **The Fifth Chat Session November 22,1996.** On November 22, 1996, Trooper Williams once again logged onto the internet and began an IRC session using the screen name "Aimee_" (R687-689). On this occasion, however, Trooper Williams had set up his computer in the State Police Barracks in Lewiston, New York, which was within a few miles of the defendant's residence on Grand Island, New York (R688-689). While Trooper Williams engaged defendant in an online chat, other members of the State Police executed a search warrant upon defendant's home and caught him "red-handed" at his keyboard (R692, 853-858).

G. **Arrest & Confession**. Defendant was arrested at his residence and transported to the nearby Lewiston State Police Barracks for questioning (R859-864). Once there, defendant gave to Investigator Robyn Cadwell a written confession wherein he admitted that he was the person named "JustMee" who had been chatting with "aimee" for the last several weeks; that during that

time he had sent "aimee_" computer graphic files of children engaged in sexual activity; that he believed that "aimee_" was fifteen years old; and that he chatted with "aimee about her coming out to Buffalo to meet him (R915-921, People's Exh. 61).

H. Indictment & Trial. For his actions described above, defendant was indicted by the Grand Jury of Oneida County on May 8, 1997. By Oneida County Indictment No. 97-158, defendant was charged with three (3) counts of Promoting an Obscene Sexual Performance by a Child in violation of Penal Law § 263. 10; three (3) counts of Promoting a Sexual Performance by a Child in violation of Penal Law § 263.15; two (2) counts of Attempted Disseminating Indecent Material to Minors in the First Degree in violation of Penal Law §§ 110.00 & 235.22; and three (3) counts of Obscenity in the Third Degree in violation of Penal Law § 235.05(l).

The trial of this matter was scheduled to begin on November 18, 1997. At that time, the People dismissed the Promoting an Obscene Sexual Performance charges and the Obscenity charges to eliminate the unnecessary "obscenity" issue from the trial. Therefore, the trial only dealt with five charges: three counts of Promoting a Sexual Performance by a Child in violation of Penal Law § 263.15, and two (2) counts of Attempted Disseminating Indecent Material to Minors in the First Degree in violation of Penal Law §§ 110.00 & 235.22.

At the conclusion of the trial, the jury convicted defendant of four of the five counts presented. Defendant was found guilty of two (2) counts of Promoting a Sexual Performance by a Child in violation of Penal Law § 263.15, and two (2) counts of Attempted Disseminating Indecent Material to Minors in the First Degree in violation of Penal Law § § I 10. 00 & 23 5.22.

On January 20, 1998, defendant was sentenced to serve two to six years in state prison for each Promoting a Sexual Performance by a Child conviction and one to three years in state prison for each Attempted Disseminating Indecent Material to Minors in the First Degree conviction. All the sentences were imposed concurrently.

The Appellate Division, Fourth Department, by decision dated June 18, 1999, unanimously affirmed the defendant's convictions.

It is from the above judgment of conviction and sentence, and the above decision of the Appellate Division, Fourth Department, that defendant now appeals.

POINT I

PENAL LAW §235.22 IS NOT IMPERMISSIBLY OVERBROAD IN VIOLATION OF ANY OF THE PROVISIONS OF THE FEDERAL OR STATE CONSTITUTIONS

A. Introduction.

It is well settled that the state has a special interest in protecting the well-being of its youth *(Ginsberg v New York, 390 US 629, 640 [1968]; New York v Ferber, 458 US 747, 776 [1982])*. The United States Supreme Court most recently reiterated this principle in *Reno v American Civil Liberties Union (521 US 844 [1997])* stating, "It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials." Further, the Supreme Court has recognized that a state's interest in safeguarding the physical and psychological well-being of a minor is a compelling one *(Globe Newspaper Co. v*

Superior Court, 45 7 US 5 96, 607 [1982]; New York v Ferber, supra at *776).*

In *1996,* New York enacted Penal Law § 235.*22* which was entitled Disseminating Indecent Material to Minors in the First Degree. In the approval memorandum, Governor Pataki

stated, "Protecting our children from pedophiles and those disseminating indecent materials to children, however, requires the active intervention of the criminal law, not passive r eliance on technology or even the vigilance of parents and teachers" (Governor's Mem approving L *1996,* ch *600, 1996* Legis Ann, at *422-423),* and later, "The legislation I approve today protects the children of this State from high-tech cybersex abuse and actual sexual abuse" (id.). Clearly, the intent of the statute is to protect the well-being of our children.

This case involves the first conviction obtained under the recently enacted Penal Law § *235.22,* which is entitled Disseminating Indecent Materials to Minors in the First Degree. In this case, defendant was actually convicted of two counts of Attempted Disseminating Indecent Materials to Minors in the First Degree, because the person with whom he was communicating was actually an undercover state trooper and not a minor.

Note that *Reno v American Civil Liberties Union (supra),* relied on by defendant, dealt specifically with the Federal Communications Decency Act. Although that decision is certainly useful in guiding us regarding the First Amendment and other Constitutional principles, its specific holding regarding the Federal Communications Decency Act should not be controlling in this case since the wording of that Federal statute is substantially different from the wording of our Penal Law § 235.22.

The Federal Communications Decency Act was struck down primarily for its use of two terms; 47 USCA § 223(a) uses the term "indecent" and 47 USCA § 223(d) uses the term "patently offensive." Neither term was defined by the statute and neither term has a common or universal meaning. Consequently, according to the Supreme Court, the vagueness of those two terms would subject innocent people to prosecution-that is, people whom the statute was never intended to include. Hence, the Supreme Court ruled that the statute was impermissibly overbroad.

New York's relevant statute, Penal Law § 235.22 contains no such vague or imprecise term. It does not contain the words "Indecent" or "patently offensive." The only term even close is "harmful to minors", which is contained in subdivision one. That term, however, is precisely defined in Penal Law § 235.20(6) with the same language used by the Supreme Court in *Miller v California* (413 US 15, 24 [1973]), and therefore cannot be unconstitutionally vague. Clearly, New York's statute does not suffer from the defect that resulted in the striking down of the Federal Communications Decency Act.

B. <u>Penal Law § 235.22 Is Not Impermissibly Overbroad.</u>

Penal Law § 235.22 states as follows:

> **Disseminating indecent material to minors in the first degree.**
>
> A person is guilty of disseminating indecent material to minors in the first degree when:
>
> 1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer

communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and

2. by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

It is important to note the word "and" at the end of subdivision one. In order to violate this statute, a person must commit the acts described in both subdivisions. A person is free to commit the act described in subdivision one, as long as he does not commit the act described in subdivision two. That is, a person is free to send graphic sexual images to a minor via the internet, as long as he does not attempt to induce the minor to engage in sexual conduct *(see,* Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 39, Penal Law § 235.22, 1999 Pocket Part, at 100).

Similarly, a person is free to commit the act described in subdivision two, as long as he does not commit the act described in subdivision one. That is, a person is free to attempt to convince a minor to engage in sexual conduct, as long as he does not send the minor any graphic sexual images.

Clearly, the conduct proscribed by Penal Law § 235.22 is very specific. To violate this statute, a person must send a graphic sexual image to a minor via the internet while at the same time attempting to induce the minor to engage in sexual conduct.

It is also **important to note that Penal Law § 235.22 is a "conduct-based" statute,** and not a "content-based" statute. The conduct proscribed is not "pure speech." At best, it is a combination of conduct and speech. Ergo, the "substantial overbreadth" doctrine enunciated in *Broadrick v Oklahoma* (413 US 601 [1973]), should be applied *(see, Point III, infra, for further discussion of this issue).* The overbreadth doctrine of the First Amendment is "strong medicine" and should be employed sparingly and only as a last resort *(Broadrick v Oklahoma, supra* at 613; *New York v Ferber, supra* at 769). The overbreadth involved must be "substantial" before a statute will be invalidated on its face *(New York v Ferber, supra* at 769). A law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications *(New York v Ferber, supra* at 771). In *Broadrick,* Justice White explained the overbreadth doctrine as follows:

> But the plain import of our cases is, at the very least, that facial overbreadth adjudication is an exception to our traditional rules of practice and that its function, a limited one at the outset, attenuates as the otherwise unprotected behavior that it forbids that State to sanction moves from "pure speech" toward conduct and that conduct-even if expressive-falls within the scope of otherwise valid criminal laws that reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct. Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect-at best a prediction-cannot, with confidence, justify invalidating a statute on its face and so prohibiting a State from enforcing the statute against conduct

> that is admittedly within its power to proscribe. Cf. *Alderman v. United States*, 394 U.S. 165, 174-175 (1969). To put the matter another way, particularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep
>
> (*Broadrick v Oklahoma, supra* at 615).

Even in dissenting with the majority in *Broadrick*, Justice Brennan observed:

> We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine
>
> (*Broadrick v Oklahoma, supra* at 630; *New York v Ferber, supra* at 772).

The statute is not overbroad. It does proscribe specific conduct. There is no possibility that an innocent person who is merely exercising his right to free speech will be arrested and prosecuted under this statute.

What is permitted by the statute - that is, what is not proscribed by the statute?

Two adults can engage a sexually explicit conversation via the internet. They can arrange a meeting to engage in sexual activity. They can engage in online sexual fantasies. They can

masturbate and describe it to each other. None of these things violate the statute.

Two adults can exchange via the internet graphic images of adults engaged in sexual activity. This does not violate the statute.

An adult can send via the internet to a minor graphic images of adults engaged in sexual activity. This does not violate the statute.

An adult can engage via the internet in a sexually explicit conversation with a minor. They can discuss arranging a meeting for the purpose of engaging in sexual activity. They can discuss and engage in online sexual fantasies. The adult could ask the minor to masturbate and describe it. None of these things violate the statute.

A person can present or discuss serious scientific, artistic or literary material regarding sexuality, or any topic, on the internet. This does not violate the statute.

A person can display even the most offensive or obscene graphic sexual images via the internet. This does not violate the statute.

The type of conduct proscribed by the statute is very specific. The statute prohibits sending via the internet to a minor a graphic image depicting sexual activity while at the same time attempting to induce the minor to engage in sexual conduct. How could it be more specific?

No **innocent person engaged in innocent activity will be swept up by** this statute. No person merely exercising his right to free speech, even if the speech is sexually explicit, will be swept

up by this statute. It is only the person who uses the internet to lure a minor into sexual activity **by sending him or her graphic** sexual images that will be swept up by this statute.

Defendant's claim that Penal Law §235.22 is overbroad is based primarily on the fact that the statute does not require that the People prove that a person intended to communicate with a minor or knew or believed he was communicating with a minor in order for a violation to be proved. Indeed, this element was purposely left out of the statute. In the approval memorandum, Governor Pataki stated, "The central purpose of the bill -- preventing the dissemination of indecent materials to minors -- would be undercut substantially if the new offenses required proof that the defendant knew he was communicating, or intended to communicate, with a minor. Accordingly, such proof is not required". However, enacted at the same time were four ordinary defenses contained in Penal Law § 235.23(3). These defenses insure that the overbreadth complained of by the defendant will not occur.

The four ordinary defenses contained in Penal Law § 235.23(2) are that:

> (a) The defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of actions taken by the minor; or
>
> (b) The defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to materials specified in such subdivision, which may involve any appropriate measures to restrict minors from access to such communications, including any method which is feasible under available technology; or
>
> (c) The defendant has restricted access to such materials by requiring use of a verified credit

> card, debit account, adult access code or adult personal identification number; or
>
> (d) The defendant has in good faith established a mechanism such that the labeling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or blocking capabilities to access that material or to circumvent any such screening or blocking.

In regard to the type of communication relevant to this case -- that is, internet relay chat or "chatting" -- and even in regard to e-mail communications, paragraph (a) would protect a person from the type of unwarranted prosecution hypothesized by defendant in his brief Requiring a person to make a reasonable effort to determine the age of the recipient of his communication before he sends that recipient graphic sexual images and attempts to induce such person to engage in sexual activity is entirely appropriate and fair. Due to the nature of the internet, the simple question, "How old are you?", would suffice. If the minor lies, and says that he is over 17 years of age, then the person was unable to determine the minor's age as a result of an action taken by the minor, and the defense applies. Note also that here, the undercover trooper at all times maintained that he was a 15 year old female and mentioned this to defendant several times (R519, 524, 574, 584, 620, 661).

Additionally, neither of the two hypothetical situations posited by defendant in his brief (at pages 23-24) would result in prosecution. The first hypothetical is based upon the mistaken delivery of e-mail to the wrong e-mail address; no person would

ever be prosecuted for such a mistake *(see,* Penal Law § 15.20). If the error was the result of the e-mail delivery system, then it was not the person sending the e-mail who caused the delivery to the minor, but the e-mail service. If the error were on the part of the person sending the e-mail-for example, a typographical error in the e-mail address-then the element of intent has been negated. The person intended to send the e-mail to person "A", not person "B." The prosecution would have to based upon some type of "transferred intent" theory which clearly has no application in this type of case.

The second hypothetical fails to include all the elements of the crime. There is no risk of prosecution under Penal Law § 235.22 to any adult who engages in online chats, no matter how sexually explicit, if a minor is eavesdropping on the chat. To violate the statute, a person must send the eavesdropping minor a graphic sexual image and then attempt to induce the minor to engage in sexual conduct. If the minor just passively listens to the chat, no violation of the statute occurs. Even if the minor participates in the chat and the chat involves engaging in sexual conduct, the potential for a violation would still not be present unless someone sends the minor a graphic sexual image. No adult need fear being prosecuted under Penal Law § 235.22 merely because a minor may be eavesdropping on a sexually explicit conversation.

The Appellate Division, Fourth Department, ruled that Penal Law § 235.22 was not impermissibly overbroad. That court stated that the overbreadth doctrine should only be applied when a statute "imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech" *(Secretary of State of Md. v Munson* Co., 467 US 947, 967-968; *People v Foley,* 257 AD2d 249). The Court

further stated that the "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge" *(Members of City Council v Taxpayers for Vincent,* 466 US 789, 800; *People v Foley, supra* at 249). And further, that an individual may challenge a statute as overbroad "only when the statute's unconstitutional reach is substantial and the statute is incapable of a reasonable limiting construction" *(People v Hollman,* 68 NY2d 202, 208; *People v Foley, supra* at 249).

The Appellate Division, Fourth Department, held that Penal Law § 235.22 was sufficiently precise to be constitutional due to its two-pronged nature - that is, that in order to violate the statute a person must send graphic images to a minor and then attempt to lure the minor into sexual activity. The court stated that, "Because of the two-pronged nature of the statute, communication between adults would not be chilled" *(People v Foley, supra* at 250).

In regard to the hypothetical situations posited by the defendant in his brief to the Appellate Division, the Appellate Division, Fourth Department, stated that "those situations would not occur with such frequency that the statute should be considered overbroad *(see, e.g., Members of City Council v Taxpayers for Vincent, supra,* at 800-801). Whatever overbreadth might exist in this statute can be cured by a case by case analysis *(see, New York v Ferber, supra,* at 773-774). Any impermissible applications of the statute would represent only a tiny fraction of the conduct within the statute's reach and thus the overbreadth is not substantial *(see, People v Hollman, supra,* at 209; *see also, New York v Ferber, supra,* at 773-774; *People v Foley, supra* at 251).

Reversal on this ground should be denied. Penal Law § 235.22 is not impermissibly overbroad. It proscribes specific conduct that is described in precise terms. Despite that a person need not communicate with a person he knows or believes to be a

minor to violate the statute, the ordinary defenses provided in Penal Law § 235.23(3) more than adequately protect a person who, in good faith, was unaware that he was communicating with a minor.

POINT 11

PENAL LAW § 235.22 DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION

A. Introduction.

Article 1, Section 8, Clause 3 of the United States Constitution states that: "The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes". This section is commonly referred to as the "Commerce Clause" of the United States Constitution.

In addition to its obvious affirmative meaning, the Supreme Court has ruled that the Commerce Clause has a negative aspect as well. In *Gibbons v Ogden* (22 U.S. 1, 6 [1824]), the Supreme Court interpreted this clause to mean that since the power to regulate commerce has been specifically granted to the Congress of the United States, the individual states cannot pass laws that unreasonably interfere with interstate commerce. This is the so-called "dormant" Commerce Clause.

The interpretation of the dormant Commerce Clause most applicable to this case is contained in *Pike v Bruce Church, Inc.* (397 US 137 [1970]). Writing for the majority, Justice Stewart stated as follows:

> Where the statute regulates even-handedly to effect a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *(Citations omitted)*. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and whether it could be promoted as well with a lesser impact on interstate activities

(Pike v Bruce Church, Inc., supra at 142).

In *Philadelphia v New Jersey* (437 US 617 [1978]), the Supreme Court offered the following analysis. Where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected. But where other legislative objectives are credibly advanced and there is no patent discrimination against interstate trade, a more flexible approach has been adopted, the general contours of which are outlined by *Pike v Bruce Church, Inc,(supra)*. The crucial inquiry, therefore, is to determine whether the challenged statute is a protectionist measure or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental *(Philadelphia v New Jersey, supra* at 624).

Because the present case involves a statute that was not intended to regulate commerce, but rather intended to protect children from being lured into sexual conduct via the internet *(see discussion infra)*, the "balancing test" enunciated in *Pike v Bruce Church Inc., (supra), -- that* is, weighing the legitimate local benefit against the incidental impact upon interstate commerce -- must be applied to this case.

B. Penal Law § 235.22 Is Not Intended To Regulate Commerce.

New York's Penal Law § 235.22 states as follows:

> **Disseminating indecent material to minors in the first degree.**
>
> A person is guilty of disseminating indecent material to minors in the first degree when:
>
> 1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
>
> 2. by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

The purpose of the statute was made quite clear by Governor George Pataki in the Approval Memorandum that accompanied the bill that enacted Penal Law § 235.22. The following quotes spell out that intent:

> "Many pedophiles are now only a few key strokes away from our children."

> "Several cases have come to light, wherein pedophiles have engaged in sexually explicit communications with minors and then attempted to arrange sexual encounters with these minors."
>
> "We must not allow our children to fall prey to those who would exploit them through this new technology."
>
> "Protecting our children from pedophiles and those disseminating indecent materials to children, however, requires the active intervention of the criminal law, not passive reliance on technology or even the vigilance of parents and teachers."
>
> "The legislation I approve today protects the children of this State from high-tech cybersex abuse and actual sexual abuse."
>
> (Governors Mern approving L 1996, ch 600, 1996 Legis Ann, at 422-423, *supra)*.

Clearly, the purpose of the statute is not to regulate commerce, but rather to protect the children of our state from being lured into sexual abuse by pedophiles via the internet.

C The Protection Of Children From Pedophiles Is A Legitimate Local Interest.

It is well settled that the state has a special interest in protecting the well-being of its youth *(Ginsberg v New York,* 390 US 629, 640 [1968]; *New York v Ferber,* 458 US 747, 776, [1982]). The United States Supreme Court most recently reiterated this principle in *Reno v American Civil Liberties Union* (521 US 844 [1997]) stating, "It is true that we have repeatedly recognized

the governmental interest in protecting children from harmful materials." Further, the Supreme Court has recognized that a state's interest in safeguarding the physical and psychological well-being of a minor is a compelling one *(Globe Newspaper Co. v Superior Court,* 457 US 596, 607 [1982]); *New York v Ferber, supra* at 776).

Even the **Federal District Court that struck down Penal** Law § 235.21(3) stated, "I accept that the protection of children against pedophilia is a quintessentially legitimate state objective" *(American Libraries Association v Pataki, 969* FSupp *160, 177* [SDNY *1997]).* In its conclusion, that Court stated, "The protection of children from pedophilia is an entirely valid and laudable goal of State legislation" *(American Libraries Association v Pataki, supra* at 183).

Clearly, the intended purpose of Penal Law § 235.22 is a "legitimate local public interest" as that term is used in *Pike v Bruce Church, Inc. (supra).*

D. ***American Libraries Association v. Pataki.***

In this case, defendant claims that New York's Penal Law § 235.22 violates the Commerce Clause since, although its intent is not to regulate commerce but rather to protect children, it impermissibly interferes with inter-state commerce, that being the internet. Defendant relies primarily on the decision of the Federal District Court for the Southern District of New York in *American Libraries Association v Pataki (supra).* That case, however, is clearly distinguishable from this case.

The decision in *American Libraries Association* was specifically limited to Penal Law § 235.21(3). At the outset, under the heading of "Background", that Court clearly states that the challenged statute is New York Penal Law § 235.21(3) *(American*

Libraries Association v Pataki, supra at *161)*. Later, the Court points out that the "plaintiffs do not challenge the sections of the statute that criminalize the sale of obscene materials to children, over the Internet or otherwise, and prohibit adults from luring children into sexual contact by communicating with them via the Internet. *See,* N. Y. Penal Law § 235.21(l); N.Y. Penal Law § 235.22(2)" *(American Libraries Association v Pataki, supra* at *179)*. Clearly, that Court did not intend its ruling to affect Penal Law § 235.22, which is the statute under attack herein.

The Appellate Division, Fourth Department, distinguished Penal Law § 235.22 from Penal Law § 235.21(3), which had been held to violate the Commerce Clause in *American Libraries Association v Pataki,* due to the additional "luring" element of Penal Law § 235.22 *(People v Foley, supra* at 253).

E. **The Local Benefit of Penal Law § 235.22 Outweighs the Incidental Impact on Interstate Commerce.**

The crucial difference between the statute struck down by the District Court and the statute challenged herein is the additional "luring" element contained in subdivision 2 of Penal Law § 235.22. It is this luring element that tips the scales in favor of the local interest.

Penal Law § 235.21(3) prohibited, in essence, the mere sending via the internet of a computer graphic image depicting sexual conduct to a minor. It is easy to see how District Court could rule that the impact on interstate commerce outweighed the local benefit of this statute. The local benefit of Penal Law § 235.21(3) is to protect our children from viewing images depicting sexual conduct. There are, however, legitimate businesses that engage in the sale of graphic sexual images, both on the internet and otherwise. Obviously, the whole pornography

industry falls into this category. This is constitutionally protected activity. When weighed against the impact that the statute could have on interstate commerce, the local benefit comes up short.

The local benefit of Penal Law § 235.22, however, is much more compelling. The local benefit of this statute is to protect New York's children from pedophiles and prevent New York's children from being lured into sexual abuse via the internet. This benefit far outweighs any incidental effect that the statute may have upon interstate commerce.

Defendant has failed to demonstrate how interstate commerce would be affected by Penal Law § 235.22. What type of *legitimate* internet business is concerned with the luring of children into sexual abuse? None. The burden is on the party challenging the constitutionality of the statute to demonstrate the claimed undue burden on interstate commerce. A bare allegation that a law imposes an unnecessary burden on interstate commerce is insufficient to render the law unconstitutional *(Pharmaceutical Manufacturers Association v Whalen,* 54 NY2d 486, 495-496 [198 1 *]; Chemical Specialties Manufacturers Association v Jorling,* 85 NY2d 382, 398 [1995]).

F. There is No Extraterritorial Application of Penal Law § 235.22.

There is no extraterritorial application of Penal Law § 235.22 since there must be a jurisdictional nexus with New York State. CPL 20.20 is entitled "Geographical Jurisdiction of Offenses; Jurisdiction of State" and sets forth the conditions under which a person may be convicted of a crime in the courts of this state. No matter what Penal Law § 235.22 says, the requirements of CPL 20.20 must still be met.,

Penal Law § 235.22 can be applied in two distinct ways. Using the internet, a suspect located in New York State could be transmitting graphic sexual images to a child while attempting to lure the child into sexual conduct, where the location of the child is irrelevant. Obviously, the court can have no quarrel with the prosecution of such an individual by New York State. Clearly, the statute can legitimately criminalize the activity of a person who is within the state.

The other application, however, involves a suspect outside of New York State. Using the internet, a suspect located outside of New York State could be transmitting graphic sexual images to a child while attempting to lure the child into sexual conduct, where the child is located in New York State. This is exactly the type of situation that prompted New York to pass Penal Law § 235.22. In the Approval Memorandum, Governor Pataki stated the following:

> Several cases have come to light, wherein pedophiles engaged in sexually explicit communications with minors and then attempted to arrange sexual encounters with these minors. One such case involved an adult male resident of Seattle, Washington, who exchanged sexually explicit communications with a thirteen-year-old girl via computer for a period of months. He then traveled to New York and attempted to meet the girl. We must not allow our children to fall prey to those who would exploit them through this new technology
>
> (Governor's Mern approving L 1996, ch 600, 1996 Legis Ann, at 422).

CPL 20.20(2)(b) allows for this type of prosecution. It states that:

> Even though none of the conduct constituting an offense may have occurred within this state: (b) The statute defining the offense is designed to prevent the occurrence of a particular effect in this state and the conduct constituting the offense committed was performed with intent that it would have such effect herein.

Prosecuting someone who commits acts outside of New York State that are designed to harm children located within New York State is clearly permitted.

Although one might argue that the mere presence of the internet, or actually the mere presence of computers and communication systems that make up part of the internet, in New York State subjects every internet user to potential prosecution under Penal Law § 235.22. Such is not he case. A simple analogy can clarify this point. For example, presume the existence of an interstate conspiracy. One party is in New York City and the other is in Miami, Florida. The parties converse for months by telephone planning their crime. One party commits an overt act in the furtherance of the conspiracy. On the eve of the commission of the planned crime, authorities in both jurisdictions arrest the conspirators. In this hypothetical, each conspirator could be charged in either state. Could each conspirator be charged in every state along the Eastern Seaboard through which their telephone calls passed? Of course not. There is no jurisdictional nexus to those states. The mere passage of the telephone signal through those states does not create jurisdiction in those states. No conduct or effect occurred in those states.

The same would hold true under Penal Law § 235.22. In another example, assume there is a pedophile in Boston, Massachusetts, attempting to lure a child in Cleveland, Ohio, into a sexual encounter via the internet. The images are transferred and

the luring chat passes over phone lines and through computers in New York State. Could the pedophile be charged in New York for violating Penal Law § 235.22? Absolutely not. There is no jurisdictional nexus. The mere passage of the phone signals through phone lines and computers in New York does not create jurisdiction. Neither the conduct nor the effect sought to be prevented occurred in New York State.

In one of its aspects, the statute is aimed at prosecuting persons located in our state who transmit graphic sexual images to a child while attempting to lure the child into sexual conduct. In this regard, the statute is directed at prohibiting *conduct* that occurs in New York State.

In another aspect, however, the statute is also aimed at prosecuting persons located outside of our state who transmit graphic sexual images to a child located within our state while attempting to lure the child into sexual conduct. In this regard, the statute is directed at preventing an *effect* that occurs in New York State.

Both aspects are permissible.

G. Penal Law § 235.22 Does Not Interfere with Uniform National Treatment of the Internet.

Defendant claims that Penal Law § 235.22 will unfairly impose New York State Law and New York State standards of decency upon the other states. One claim is based upon the phrase "harmful to minors" that is contained in the statute. However, that phrase is defined by the New York State Penal Law using the same terminology used by the United States Supreme Court in *Miller v California* (413 US 15, 24 [1973]). This is a national standard that already applies to all the states.

The **term "harmful to minors" is defined in Penal** Law § 235.20(6) as "that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(a) Considered as a whole, appeals to the prurient interest in sex of minors; and

(b) Is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors."

Clearly, New York State has not attempted to impose its own standards of decency upon the other states. On the contrary, by codifying the same standard used by the Supreme Court in *Miller v California (supra)*, New York State has shown its willingness to be governed by a uniform national standard in regard to what is "harmful to minors."

The Appellate Division, Fourth Department, concluded that "any incidental effects that Penal Law § 235.22 may have on commerce are not unduly burdensome in relation to the compelling interest of the State in protecting children" *(People v Foley, supra* at 253).

Reversal on this ground should be denied. Penal Law § 235.22 is not intended to regulate interstate commerce, although it may do so incidentally. Any incidental impact upon interstate commerce is far outweighed by the legitimate state interest that New York State has in protecting its children from being lured

into sexual conduct via the internet. There is no extra-territorial application of New York State law onto the other states since a jurisdictional nexus with New York State must be established. The statute does not seek to impose New York State standards of decency upon the other states since its terms are defined to be in accordance with a uniform national standard.

POINT III

PENAL LAW § 235.22 IS NOT UNCONSTITUTIONALLY VAGUE

Defendant complains that Penal Law § 235.22 is unconstitutionally vague since the terms used therein are so unclear that a person reading the statute would not know what is prohibited. He complains specifically of several terms used in the statute, but each of those terms is either precisely defined by statute or has a common, ordinary meaning.

Sexual Contact. Although not defined in Article 235, the term "sexual contact" is defined in Penal Law § 130.00(3) as "any touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing."

Importunes, Invites or Induces. These terms are not defined by the Penal Law and therefore would have their common, ordinary meanings. The word importune is used by several other Penal Law statutes, see Penal Law § § 20.00, 100.00, 100.05, 100.08, 100. 10, and 100. 13.

Inducing a Minor to Masturbate. A person who invites a minor to engage in sexual conduct for his benefit violates

subdivision two of Penal Law § 235.22. Sexual conduct includes masturbation pursuant to Penal Law § 235.20(3). The sexual gratification of the person would constitute a benefit. Therefore, a person who invites a minor to masturbate for the purpose of his own sexual gratification has violated Penal Law § 235.22(2).

Sexual Conduct. The term "sexual conduct" is defined in Penal Law § 235.20(3) as "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person is a female, breast."

Harmful to Minors. The term "harmful to minors" is defined in Penal Law § 235.20(6) as "that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:

(a) Considered as a whole, appeals to the prurient interest in sex of minors; and

(b) Is patently offensive to the prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and

(c) Considered as a whole, lacks serious literary, artistic, political and scientific value for minors."

This definition is based upon the language used by the Supreme Court in *Miller v California* (413 US 15, 24 [1973], *supra),* and must therefore not be unconstitutionally vague.

Benefit.. The term benefit is defined in Penal Law § 10. 00(17) as "any gain or advantage to the beneficiary and includes

any gain or advantage to a third person pursuant to the desire or consent of the beneficiary." Sexual gratification most certainly qualifies as a benefit.

The Appellate Division, Fourth Department, ruled that Penal Law § 235.22 was not void for vagueness *(People v Foley, supra* at 251-252).

Reversal on this ground should be denied. Each and every term used in Penal Law § 235.22 is either precisely defined by statute or has a plain ordinary meaning. No person reading the statute would not know what type of conduct is being prohibited.

POINT IV

PENAL LAW § 235.22 IS A NOT AN IMPERMISSIBLE REGULATION ON FREE SPEECH

Defendant claims under this point of his appeal that Penal Law § 235.22 is a "content-based" restriction on free speech and therefore must be subject to strict scrutiny. However, it is the People's position that Penal Law § 235.22 is a "content-neutral" regulation of free speech and is actually more a restriction of *conduct,* than speech.

Please note that defendant asserts that the New York State Constitution provides greater protection of free speech than does the Federal Constitution. Although this is undeniably true, the additional protection is the requirement that there exist a genuinely close fit between the asserted State interest burdening free speech and the restrictions imposed by law *(Children of Bedford, Inc. v Petromelis,* 77 NY2d 713, 731 [199 1]). Penal Law § 23 5.22 certainly meets this standard and defendant does not argue that it does not.

A. **Penal Law § 235.22 Regulates Conduct.**

Penal Law § 235.22 does not restrict free speech; it prohibits the luring of children into sexual abuse via the internet. In order to violate Penal Law § 235.22, a person must commit two *affirmative acts*.

First, the person must transmit via the internet to the child a graphic image of sexual conduct. This requires an action on the part of the person. The person must select an image and then affirmatively send the image to a target via the internet. This is a conscious choice that the person makes and a conscious action on their part. This action -- the sending of the graphic images -- is crucial to the pedophile's goal. The pedophile sends the graphic image to the child to desensitize the victim to sexual taboos. The pedophile tries to break down any reluctance or uneasiness that the child may have regarding sexual activity by sending the child pictures of people, possibly children, engaged in sexual activity. The pedophile tries to convince the child that sexual activity, even with children, is "okay." This is one of the oldest forms of persuasion known to man -- "Come on, everybody's doing it. It's fun! Give it a try!" By breaking down the child's inhibitions, the child becomes an easier target for the pedophile.

Second, while doing the above, the person must also try to importune, invite or induce the child to engage in sexual conduct for his benefit. Even though the importuning, inviting or inducing takes the form of words, this subdivision is not a restriction of free speech. The state is not concerned with the words used by the pedophile, but by the *category* of the words. The state is not concerned with the words used by the pedophile, but by the *secondary effect* of the words. The state is concerned with the luring of children into sexual abuse via the internet.

B. Penal Law § 235.22 Is A "Content-Neutral" Regulation of Free Speech.

Defendant cites the case of *Boos v Barry (485 US 312 [1988[)*, in support of his argument, yet, that case is off-point. *Boos v Barry*, dealt with the restriction of political speech in a public forum. The Supreme Court stated that a "content-based" restriction on political speech in a public forum must be subjected to the most exacting scrutiny *(Boos v Barry, supra* at *321)*. This case does not involve political speech in a public forum.

This case is more akin to the situation presented in *Renton v Playtime Theatres, Inc. (475 US 41 [1986])*, wherein an ordinance enacted by the city of Renton, Washington, regulating the location of adult motion picture theaters was upheld as constitutional. The Supreme Court stated that "content-neutral" time, place, and manner regulations are acceptable as long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication *(Renton v Playtime Theatres, Inc., supra* at *47)*. Alhough, *Renton v Playtime Theatres* dealt with "time, place, and manner regulation", the principles set forth by the Supreme Court therein are directly relevant to this case.

The critical distinction that the Court in *Renton v Playtime Theatres* noted was that the ordinance was not directed at the specific content of the speech, but rather, the *secondary effects* of the adult theaters on the surrounding community. The Supreme Court observed the following:

> [T]he Renton ordinance is aimed not at the *content* of the films shown at 'adult motion picture theaters,' but rather at the *secondary effects* of such theaters on the surrounding community. The District Court found that the City Council's

> *'predominate* concerns' were with the secondary effects of adult theaters, and not with the content of adult films themselves *(Renton v Playtime Theatres, Inc., supra* at 47). The Supreme Court further stated the following:

The District Court's finding as to 'predominate' intent, left undisturbed by the Court of Appeals, is more than adequate to establish that the city's pursuit of its zoning interests here was unrelated to the suppression of free expression. The ordinance by its terms is designed to prevent crime, protect the city's retail trade, maintain property values, and generally 'protec[t] and preserv[e] the quality of [the city's] neighborhoods, commercial districts, and the quality of urban life,' not to suppress the expression of unpopular views *(Renton v Playtime Theatres, Inc., supra* at 48). The Supreme Court concluded that "the Renton ordinance is completely consistent with our definition of "content-neutral" speech regulations as those that *'are justified without* reference to the content of the regulated speech"' *(Renton v Playtime Theatres, Inc., supra* at 48). Such is the case herein. The aim of Penal Law § 235.22 is not to proscribe any particular words or to prevent the free flow of ideas or to limit freedom of expression in any way. The sole purpose of Penal Law § 235.22 is prevent children from being lured into sexual abuse via the internet. The purpose of the statute was made quite clear by Governor George Pataki in the Approval **Memorandum that accompanied the bill that enacted PL** § 235.22. The following quotes spell out that intent:

> "Many pedophiles are now only a few key strokes away from our children."
>
> "Several cases have come to light, wherein pedophiles have engaged in sexually explicit

> communications with minors and then attempted to arrange sexual encounters with these minors."
>
> "We must not allow our children to fall prey to those who would exploit them through this new technology."
>
> "Protecting our children from pedophiles and those disseminating indecent materials to children, however, requires the active intervention of the criminal law, not passive reliance on technology or even the vigilance of parents and teachers."
>
> "The legislation I approve today protects the children of this State from high-tech cybersex abuse and actual sexual abuse."
>
> (Governor's Mem approving L 1996, ch 600, 1996 Legis Ann, at 422-423).

Clearly, the purpose of the statute is not to restrict free speech, but rather to protect the children of New York State from being lured into sexual abuse by pedophiles via the internet.

1. Penal Law § 235.22 Is A Time, Place And Manner Regulation.

Although it is not obvious at first glance, Penal Law § 235.22 is actually a time, place and manner regulation. Although it does not specifically regulate the time of the speech, it does regulate the place and the manner.

The place is "cyberspace" or the internet. This novel concept is what makes this point difficult to perceive. Time, place and manner regulations have typically sought, usually through

zoning regulations, to keep adult businesses out of the places where our children are likely to be. These physical locations are easily identifiable and, with a bit of careful wording, describable and codifiable. However, the internet is everywhere. It comes into our businesses, our homes, our living rooms, our bedrooms-anywhere that a computer can be connected to a phone line can be a part of cyberspace. Of course, the New York statute cannot seek to regulate the whole of cyberspace. This would be impossible and certainly unconstitutional. But what the statute can do, and does do, is regulate that part of the internet that comes into our businesses and our homes here in the State of New York *(See discussion under Point H, Sub-Point F)*.

Further, the statute regulates the manner of speech by making it illegal to send a graphic image of sexual conduct to a child while at the same time trying to induce the child into committing a sexual act. Clearly, this is not the expression of free speech. This is not the free exchange of ideas envisioned by our founding fathers when they drafted the First Amendment.

If there is any doubt regarding whether or not the type of speech involved in this case is the free expression of ideas or an attempt to lure a child into sexual abuse, one need only review the transcripts of the chat logs that were admitted into evidence at trial *(People's Exhs. 2, 34, 41, 44,* 50). These chat logs are filled with the vilest most despicable language by defendant that is clearly an attempt to set up a meeting with "aimee_", who he believed was a *15* year old girl, for the purpose of engaging in sexual conduct.

Clearly, Penal Law § 235.*22* is a place and manner regulation of speech.

C. Penal Law § 235.22 Serves A Substantial Governmental Interest.

It is well settled that the state has a special interest in protecting the well-being of its youth *(Ginsberg v New York, 390 US 629, 640 [1968]); New York v Ferber, 458 US 747, 776 [1982],supra)*. The United States Supreme Court most recently reiterated this principle in *Reno v American Civil Liberties Union (521 US 844* [1997]) stating, "It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials." Further, the Supreme Court has recognized that a state's interest in safeguarding the physical and psychological well-being of a minor is a compelling one *(Globe Newspaper Co. v Superior Court, 457 US 596, 607 [1982]; New York v Ferber, supra* at *776)*.

Even the Federal District Court that struck down Penal Law § *235.21(3)* stated, "I accept that the protection of children against pedophilia is a quintessentially legitimate state objective" *(American Libraries Association v Pataki, 969* FSupp *160, 177* [SDNY *1997], supra)*. In its conclusion, that Court stated, "The protection of children from pedophilia is an entirely valid and laudable goal of State legislation" *(American Libraries Association v Pataki, supra* at *183)*.

Clearly, the intended purpose of PL § *235.22* is a "substantial governmental interest" as that term is used by the Supreme Court in *Renton v Playtime Theatres, Inc.*

Ultimately, the Supreme Court held in *Renton v Playtime Theatres, Inc.*, that the Renton ordinance represented a valid governmental response to the "admittedly serious problems" created by adult theaters *(Renton v Playtime Theatres, Inc., supra* at *54)*. Similarly, Penal Law § *235.22* is nothing more than a valid

governmental response to the admittedly serious problems created by pedophiles using the internet to lure children into sexual abuse.

D. Even If Penal Law § 235.22 Is Content-Based, the Statute Is A Precisely Drawn Means Of Serving A Compelling State Interest And Is No Broader Than Necessary.

The Appellate Division, Fourth Department, ruled that Penal Law § 235.22 was a content-based restriction on speech *(People v Foley, supra* at *252)*. That Court, however, held that the statute was constitutional since it was a precisely drawn means of serving a compelling state interest and that it was no broader than necessary *(People v Foley, supra* at *252)*.

Reversal on this ground should be denied. Penal Law § 235.22 is actually more of a regulation of conduct than speech. Its impact on speech is not "content-based", but rather "content-neutral." The statute seeks to prevent the *secondary effect* of speech, not the actual speech itself. The state is not seeking to limit freedom of expression in any way. The state is seeking to protect its children from pedophiles who use the internet to lure children into sexual abuse. Even if Penal Law § 235.22 is content-based, the statute is a precisely drawn means of serving a compelling state interest and is no broader than necessary.

POINT V

THE CONSTITUTIONALITY OF PENAL LAW § 263.15 HAS BEEN UPHELD BY THE UNITED STATES SUPREME COURT AND THE NEW YORK STATE COURT OF APPEALS

The Supreme Court of the United States has ruled that New York State Penal Law § 263.15 does not violate the Federal

Constitution *(New York v Ferber,* 458 US 747 [1982]). The Supreme Court dealt specifically with the issue of overbreadth in section three of its decision. After an extensive analysis, the Supreme Court ruled that Penal Law § 263.15 was not substantially overbroad and held that the statute did not violate the First Amendment of the Federal Constitution (New *York v Ferber, supra* at 773-774).

Following the decision of the Supreme Court, the New York State Court of Appeals, which had previously struck down Penal Law § 263.15 on Federal Constitutional grounds, upheld that section under the State Constitution. The Court of Appeals concluded that the statute did not violate the right of freedom to expression guaranteed by the State Constitution *(People v Ferber,* 57 NY2d 256 [1982]).

The arguments made by defendant under this point of his brief clearly go to the sufficiency of the proof offered by the prosecution regarding the Penal Law § 263.15 convictions, not the constitutionality of that section. The sufficiency of the evidence is discussed *infra* in Point VI.

Reversal on this ground should be denied. Both the United States Supreme Court and this Court have upheld the constitutionality of Penal Law § 263.15. In so doing, the Supreme Court stated specifically that Penal Law § 263.15 was not impermissibly overbroad.

POINT VI

DEFENDANT'S CONVICTIONS FOR PROMOTING THE SEXUAL PERFORMANCE OF A CHILD IN VIOLATION OF PENAL LAW § 263.15 ARE SUPPORTED BY SUFFICIENT EVIDENCE AND ARE NOT AGAINST THE WEIGHT OF THE EVIDENCE

In assessing whether or not the evidence was sufficient to sustain a verdict of guilty and to prove the defendant's guilt beyond a **reasonable doubt,** the evidence is to be viewed in the light most favorable to the prosecution *(People v Lipsky,* 52 NY2d 560, 563 [1982]; *People v Contes,* 60 N`Y2d 620, 621 [1983]). Even where the sufficiency of circumstantial evidence is at issue, the facts are viewed in the light most favorable to the prosecution *(People v Benzinger,* 36 NY2d 29, 32 [1974]; *People v Kennedy,* 47 NY2d 196, 203 [1979]).

In this case, the People introduced into evidence 33 digital photographs that had been sent to Trooper Williams via the internet by defendant. People's exhibits 5 through 33 were printouts of digital photographs sent to Trooper Williams by defendant via the internet on October 28, 1996 (R546-566). People's exhibit 37 was a printout of a digital photograph sent to Trooper Williams by defendant via the internet on November 13, 1996 (R610-61 1). People's exhibits 47 through 49 were printouts of digital photographs sent to Trooper Williams by defendant via the internet on November 20, 1996 (R671-674).

Although some of the photographs depicted adults engaged in sexual activity, many of the photographs depicted children engaged in sexual conduct and clearly violated Penal Law § 263.15. Defendant alleges that the proof at trial regarding whether the children depicted in the photographs were actual children was deficient.

During its charge to the jury, the court instructed the jury regarding Penal Law § 263.25 (R1285). That section states:

> **Proof of age of a child.**
>
> Whenever it becomes necessary for the purposes of this article to determine whether a child who participated in a sexual performance was under the age of sixteen years the court or jury may make such determination by any of the following: personal inspection of the child; inspection of a photograph or motion picture which constituted the sexual performance; oral testimony by a witness to the sexual performance as to the age of the child based upon the child's appearance; expert medical testimony based upon the appearance of the child in the sexual performance; and any other method authorized by any applicable provision of law or by the rules of evidence at common law.

In determining the age of a child depicted in a sexual performance, this section allows the jurors themselves to make an inspection of the **photograph** or motion picture which constitutes the sexual performance and to make their determination of age based upon that inspection. In addition, upon the laying of a proper foundation (R718-720), Trooper Williams was allowed to give his opinion regarding the ages of the children in some of the photographs. He indicated that in his opinion, People's exhibits 5, 8, 10, 15, 17, 18, 19, 21, 22, 23, 24, 26, 27, 29, 30, 31, 32, 12, 13, 6, 7, 9, 11, 47, 48 and 49 all depicted children under the age of sixteen engaged in sexual conduct (R720-726).

Clearly, based upon the jury's ability to view the photographs themselves and to make their own determination as to the ages of the children depicted therein, together with Trooper

Williams' well-qualified opinion, the proof of the age of the children is sufficient.

Dr. Daniel Murphy, a witness called by the defense, testified that computer graphic images could be altered by someone using computer software (R1006-1018). Despite his lengthy testimony and despite his expertise, Dr. Murphy could only point to one of the exhibits and say that it might have been altered. He testified that in People's exhibit 30, the head looked too big for the body. When asked on direct if he saw a cropping line, he answered: "Well, let me say this is not a very good reproduction. This is not what it would look like on a computer screen. So, based on this printed piece, it could be cropped. But, again, it's hard - It's hard to tell." (R1015). Such statement hardly constitutes expert testimony that the image, or any image, had been altered.

"Questions relating to credibility and to the weight to be given to particular testimony, including that of opposing expert witnesses, are for the trier of fact to resolve" *(see, People v Siu Wah Tse,* 92 AD2d 3 5 0; *People v* Vigo, 170 AD2d 192 [1 st Dept 199 1]). Defendant's expert testimony, like any expert testimony, can be accepted or disregarded by the jury. The jury is the ultimate determiner of the facts and an **opinion from** an expert cannot usurp that role. A jury does not need an expert to describe to them what they can see with their own eyes.

During summation, the prosecutor **asked the jury** to examine the photographs themselves and to make their own determination as to whether or not they had been altered. He stated:

"All right. Now obviously -- obviously computer graphic files can be altered. There's no question about it. Even before the existence of computer graphic files, photographs could be altered

by airbrush and by other means. It's nothing new. There's nothing startling about that revelation. However, there's no evidence in this case that any computer files or photos, or whatever you want to call them, have been altered. It's just not here. If you need to, take a look at the print-outs, or, if you need to, we'll bring a computer in and you can come back in and look at the images again. But if you do, you will see no evidence of alteration, no crop lines. You'll see that the backgrounds of all the images are consistent. The shadows are consistent. The colors, contrasts, and textures are consistent. The body portions are proper. Do not speculate. Do not say, well, maybe they could have been altered. Base your decision on the facts. Look at the print-outs. Look at the images, if you need to, and you will see that they -- that they have not been altered" (R1247-1248).

During closing instructions, regarding expert testimony, the court instructed the jury as follows:

> When an expert testifies as to an opinion, that does not mean that the expert is taking over the function of the juror. It is up to you to determine whether the expert is qualified to express such an opinion and that the expert's opinion is based upon facts which have been established to your satisfaction, beyond a reasonable doubt. If you come to the conclusion that the so-called expert witness is qualified by training, study, or experience to express an opinion and that the opinion given is logical, reasonable, and correct, then you are at liberty to accept it or to reject it. Whatever weight or credence you give to it is solely for you to determine, as in the case of all other evidence
>
> (R1283).

The Appellate Division, Fourth Department, ruled that defendant's convictions under Penal Law § 263.15 were based upon legally sufficient evidence and that the verdict was not against the weight of the evidence *(People v Foley, supra* at 253). The Court stated: "The People submitted sufficient proof that the graphic images sent by defendant were pictures of actual children and had not been altered. The jury had the pictures before it to review, and its determination that the pictures represented actual children is supported by the record *(People v Foley, supra* at 253-254).

Reversal on this ground should be denied. The jury heard the testimony of the defendant's expert. The jury examined the photographs themselves. The jury came to their own conclusion regarding whether or not the photographs had been altered, as is their right. Their determination, being supported by the evidence and not being unreasonable, must be upheld.

POINT VII

THE TRIAL COURT DID NOT IMPROPERLY RESTRICT DEFENDANT'S RIGHT TO CROSS-EXAMINATION

The nature and extent of cross-examination are matters that are entrusted to the sound discretion of the trial court *(People v Walker,* 83 NY2d 445, 462 [1994]; *People v Starks,* 236 AD2d 621, 623 [lst Dept 1997]). Reversal on this ground can only occur where the trial court has abused its discretion in regard to its rulings during cross-examination. No such abuse of discretion occurred in this case.

At trial, Trooper Williams, the prosecution's main witness, openly and honestly admitted that he was an alcoholic (R487). This information was revealed so that defendant could

explore the possibility of whether or not the witness had been drinking or intoxicated during the course of the investigation.

Please note that it is not the fact that Trooper Williams was an alcoholic that impacts upon his credibility. The issue is: was the witness drinking or intoxicated while he was "chatting with" or gathering evidence regarding this defendant. This distinction was apparently not perceived by defendant's trial counsel.

A review of the trial transcript will show that defense counsel was not improperly foreclosed from cross-examining Trooper Williams regarding his drinking. Defense counsel was simply unable to frame a relevant question.

During cross-examination, Trooper Williams once again freely and openly admitted that he was an alcoholic (R731-732). However, the People objected when defense counsel began to question the witness regarding details of the history of his addiction. Defense counsel asked, "Okay. So you first started doing heavy drinking in your teens?" The People objected because "when the witness first started drinking heavily" is totally irrelevant. The court sustained the objection and directed defense counsel to "move on to something else." (R732).

Ignoring the court's directive, defense counsel persisted and asked, "Well, I know you've admitted that you're an alcoholic. Did you used to drink on the job when you worked as a State Trooper?" (R732). The People objected since the question was too general in regard to time. Whether the witness "used to drink" on duty is irrelevant. Whether he was drinking during the course of the present investigation is what is relevant. The court sustained the objection and again directed defense counsel to move on (R732).

Defense counsel then asked the first relevant question regarding this issue, "Okay. Had you been drinking before you reported to duty **on October** 27t', 19967 (R733). The People objected, but the court overruled the objection since the question was specific enough as to time to be relevant. The witness answered the question, "Absolutely not." (R733).

Thereafter, defense counsel never asked the witness about drinking again. After he had finally framed a relevant question, he abandoned the line of questioning. If defendant is now dissatisfied with the cross-examination of Trooper Williams regarding drinking, he should not point his finger at the trial court. He need look no further than his trial counsel's inartfully drafted questions and his trial counsel's inexplicable abandonment of the line of questioning once he had framed a proper question.

The Appellate Division, Fourth Department, ruled that the trial court did not improperly restrict the cross-examination of the State Trooper regarding his alcohol addiction *(People v Foley, supra* at 254). The Court stated that although it "was proper for defense counsel to cross-examine the Trooper concerning his use of alcohol during the computer conversations with the defendant, it was improper for counsel to cross-examine him regarding his alcohol use where such alcohol use had no relation to his ability to recall or perceive the events in question *(People v Freeland,* 36 NY2d 518, 525; *People v Perotti,* 233 AD2d 936, *lv denied* 89 NY2d 945; *People v Van Nostrad,* 217 AD2d 800, 802, *lv denied* 87 NY2d 85 *1)" (People v Foley, supra* at 254).

Reversal on this ground should be denied. Defendant's right to cross-examination was not improperly restricted by the court. The trial court's rulings on the objections to defense counsel's questions were proper. The questions by defense counsel were poorly framed and requested irrelevant information. The one

properly framed question asked by defense counsel regarding the witness's drinking was permitted by the court.

POINT V111

THE PROSECUTION ESTABLISHED AN ADEQUATE CHAIN OF CUSTODY

One of the items offered into evidence by the prosecution at the trial of this matter was a "zip" disk (a removable disk capable of storing approximately 100 megabytes of information) (People's Exhibit 1). This disk contained all the computer graphic files that had been sent by defendant to Trooper Williams and transcripts or logs of all the chat sessions between defendant and Trooper Williams, as well as some other files relative to this case.

At the outset, it should be noted that this point has not been preserved for appellate review. People's Exhibit I was admitted into evidence over an unspecified objection. Defense counsel merely stated, "Your Honor, no further objection other than the objections I've already made with respect to Exhibit I" (R54 1). Defense counsel, however, had never made any objections to People's Exhibit 1.

Criminal Procedure Law 470.05, subdivision 2, provides, in part:

> For purposes of appeal, a question of law with respect to a ruling or instruction of a criminal court during a trial or proceeding is presented when a protest thereto was registered, by the party claiming error, at the time of such ruling or instruction or at any subsequent time when the court had an opportunity of effectively changing the same.

This preservation requirement has been held to apply to an objection to the introduction of testimony or the introduction of an item into evidence *(People v Clarke,* 81 NY2d 777 [1993]; *People v Montgomery,* 195 AD2d 886 [3rd Dept 1993]). Further, such objection must be specific in order to preserve the issue for appellate review.

In *People v Clarke,* the Court of Appeals stated:

> In this case defense counsel made only a general objection to the court's multiple rulings regarding the proposed testimony of a witness. Accordingly, defendant's present contention that the testimony constituted hearsay and improperly bolstered another prosecution witness' testimony has not been preserved for our review (id., *supra* at 778).

In *People v Montgomery,* the Appellate Division, Third Department stated:

> This issue was not properly preserved for our review. Defendant failed to object to the admission of the advertisement into evidence on the specific ground that he now raises on appeal. Defendant's objection to the advertisement was that it was irrelevant and confusing. Such objection will not preserve for review a claim that the evidence lacked a proper foundation" (*id., supra* at 887).

Clearly, defense counsel's general remark does not constitute an objection specific enough to preserve this issue for appellate review.

Notwithstanding defendant's claims, the **chain** of custody for the admission of the disk into evidence would be found to be

adequate. The chain of custody was established by the testimony of Trooper Williams (R510-514, 541-542).

Trooper Williams identified People's Exhibit I as the zip disk that contained all the electronic information he had gathered regarding the Foley investigation and other investigations of a similar nature. He testified that the disk had his writing on the front of it. He stated that the information pertinent to the Foley case was contained in a directory called "JustMee" (R5 10).

Trooper Williams testified that all the files on the disk were in the same condition as they had been in immediately after they had been saved to the disk (R511-512).

Trooper Williams testified that originally the disk had been stored in the evidence room of the Computer Crimes Unit of the New York State Police Marcy Barracks. He stated that the evidence room was a locked room to which only three people had the key (R512).

Trooper Williams testified that in June of 1997 the disk was given to him along with a box of personal items when he had been suspended from duty. Please note that the suspension was for personal conduct unrelated to Trooper Williams' job performance or his work on this case. Trooper Williams stated that he had placed the box in a closet at his residence and that it had remained there, untouched, ever since. Trooper Williams testified that he had retrieved the disk "yesterday" and had brought it with him "this morning" to be used at trial (R513).

Trooper Williams reiterated that no changes had been made to files involving "JustMee" and that no changes had been made to the disk at all. He stated that the disk had either been at the Marcy Computer Crime Unit or in his possession at all times (R513-514).

Clearly, this chain of custody is sufficient. Any question that defendant might raise regarding the chain of custody merely goes to the weight that is to be afforded to the article of evidence and not to the article's admissibility.

This rule was stated by the Court of Appeals in *People v Julian* (41 NY2d 340 [1977]). In regard to a challenge to the chain of custody of an item in that case, this Court wrote, "While the deficiencies in the chain of custody may certainly be used to discredit the weight of the real evidence, those deficiencies were not sufficient to render that evidence inadmissible" *(People v Julian, supra* at 344). This rule has been followed universally by all the Departments of the Appellate Division *(People v Sarmiento,* 168 AD2d 328 [1st Dept 1990], *affd* 77 NY2d 976 [1991]; *People v Newman,* 129 AD2d 742 [2nd Dept 1987]; *People v Waite,* 243 AD2d 820 [3rd Dept 1997]; *People v Miller,* 242 AD2d 896 [4th Dept 1997]).

The Appellate Division, Fourth Department, held that the admission of the computer disk, the transcripts of the conversations between the Trooper and defendant, and the graphic images sent by defendant to the Trooper, had been properly admitted into evidence *(People v Foley, supra* at 254). That Court stated that the contents of the disk were unique and that the Trooper's identification of the disk was sufficient evidence of its accuracy and authenticity (id.).

Reversal on this ground should be denied. The issue raised herein has not been properly preserved for appellate review. Further, even if this issue were reviewed, no error would be found.

CONCLUSION

In accordance with the above, the People respectfully request that the judgment of conviction and the ruling of the Appellate Division, Fourth Department, be unanimously affirmed.

Respectfully submitted,

MICHAEL A. ARCURI, ESQ.
Oneida County District Attorney
Oneida County Courthouse
Utica, NY 13501

WILLIAM M. WEBER, ESQ.
Assistant District Attorney
Of Counsel

A-183

To be Argued by:
Paul J. Cambria, Jr., Esq.
Estimated Time for Argument:
30 Minutes

STATE OF NEW YORK
COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

THOMAS R. FOLEY, SR.,
Appellant.

Appellate Division, Fourth Department
Docket No. KA 98-2083

Oneida County Indictment No. 97-158

REPLY BRIEF FOR APPELLANT

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
PAUL J. CAMBRIA, JR., ESQ.
ROGER W. WILCOX, JR., ESQ.
Attorneys for Defendant/Appellant
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

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STATEMENT OF FACTS

Appellant relies on the factual recitations set forth in his original brief on appeal to this Court.

POINT I

PENAL LAW §235.22 IS UNCONSTITUTIONALLY OVERBROAD IN VIOLATION OF THE FIRST AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 8 OF THE CONSTITUTION OF THE STATE OF NEW YORK

The People's response to appellant's contention that Penal Law §235.22 is unconstitutionally overbroad suffers from oversimplification of important free speech issues. Contrary to respondent's urgings, the relevant question before this Court is not what speech Internet users may be permitted to engage in, but rather the degree to which otherwise lawful communication is burdened by the ranging scope of this statute's application.

One of this criminal statute's major defects in terms of an overbreadth analysis is the absence of any requirement that the People prove beyond a reasonable doubt that the accused Internet speaker intended to communicate with a minor in the prohibited manner. The absence of such a specific intent element or any requirement that the People prove that the accused took any measures to actually consummate a meeting with a minor substantially increases the risk that Penal Law §235.22 may be applied in a manner which impermissibly restricts constitutionally protected expression.

Although certainly it is not a precedent which is binding on this Court insofar as it addresses a federal statute utilizing different terminology, as even the People acknowledge, the United States Supreme Court's decision in Reno v. American Civil Liberties Union is particularly instructive. Reno v. American Civil Liberties Union, 521 U.S. 844, 117 S.Ct. 2329 (1997). While appellant has never intimated that Penal Law §235.22 suffers from precisely the same defects as the Federal Communications Decency Act (47 U.S.C. §223, *et seq.*), the Supreme Court's discussion of the *scienter* element included in that statute bears closely upon the issues confronting this Court.

For instance, the People in the case at bar maintain that Penal Law §235.22 is not overbroad because adult Internet speakers need only preface their exercise of free speech rights by questioning audience members as to their age. Once the Internet speaker has verified that all those with whom he is communicating have reached the age of majority, the People maintain that the adult speaker is free to communicate sexual ideas and fantasies with other adults and exchange sexually explicit images with other adult parties to the Internet conversation.

A similar argument was advanced by the Justice Department in defense of the Communications Decency Act ("CDA") against an overbreadth challenge. There, the Government maintained that because the CDA prohibited the dissemination of indecent messages only to persons known to be under eighteen years old, thereby permitting adults to continue to exchange indecent material with each other, the scope of the application of the CDA was appropriately and constitutionally limited.

In rejecting the Government's arguments against the overbreadth claim advanced by the American Civil Liberties Union, the Supreme Court made observations similarly important to the

instant case. First, the Court dismissed the idea that the CDA's requirement that the Internet user know that the message recipient is a minor ensured that the CDA would not diminish or interfere with adult-to-adult communication:

> Given the size of the potential audience for most messages, in the absence of a viable age verification process, the sender must be charged with knowing that one or more minors will likely view it. Knowledge that, for instance, one or more members of a 100-person chat group will be minor -- and therefore that it would be a crime to send the group an indecent message -- would surely burden communication among adults.

Reno v. American Civil Liberties Union, supra at 876, 117 S.Ct. at 2347.

Second, the Supreme Court noted that a *scienter* element with respect to the age of the message recipient was, in itself, not sufficient to properly narrow the scope of the CDA's application:

> This argument ignores the fact that most Internet fora -- including chat rooms, newsgroups, mail exploders, and the Web -- are open to all comers. The Government's assertion that the knowledge requirement somehow protects the communications of adults is therefore untenable. Even the strongest reading of the "specific person" requirement of §223(d) cannot save the statute. It would confer broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech who might simply log on and inform the would-be discoursers that his 17-year-old child -- a "specific person . . . under eighteen years of age,"

47 U.S.C.A. §223(d)(1)(A) (Supp. 1997) -- would be present.

Reno v. American Civil Liberties Union, supra at 880, 117 S.Ct. at 2349.

Certainly appellant does not contend that the inclusion of a mere knowledge component in Penal Law §235.22 would suffice to constitutionally delimit the scope of its application. Indeed, the People's position that the statute is saved from overbreadth by virtue of what they characterize as "the simple question, 'How old are you?'," ignores the very real "heckler's veto" problem highlighted by the Supreme Court and its pervasive chilling effect on otherwise lawful speech. Respondent's oversimplification of the complex communications world known as the Internet is nowhere more obviously illustrated than in this instance. The People's response ignores a fact recognized by the Supreme Court and other courts which have considered the impact of speech proscriptions on Internet communication: expression by Internet speakers is not limited to direct person-to-person e-mails or one-on-one chat discussions. Rather, popular Internet speech platforms -- often related to erotic expression -- provide for group discourse without limitation as to age, race, gender or any other categorical label. These fora, whether they be chat rooms or bulletin boards or newsgroups, permit multiple speakers and message recipients to monitor and/or participate in discussions on a huge variety of topics on a schedule of their choosing and with anonymity. To require those who wish to engage in sexually-oriented communication via these Internet fora to ascertain the age status of every participant or recipient of the communication is both impracticable and unreasonable.

Moreover, even if the Internet speaker could somehow survey every member of his ever-changing audience to determine whether they are of legal age, all it would take to shut down

discourse in a public forum such as chat room is for one of the participants to declare that he is seventeen years old or younger, whether or not that is actually true. The ability of adults to voluntarily exchange sexual thoughts or fantasies along with sexually explicit images would thereby be quashed by a single individual. See, Reno v. American Civil Liberties Union, supra.

Appellant submits that the only potentially effective way of limiting the scope of the application of Penal Law §235.22 is to require not merely a knowledge element, but rather to impose upon the People the burden of proving beyond a reasonable doubt that the accused Internet speaker specifically intended to communicate with a minor and took some overt step to facilitate a meeting for the purposes of engaging in prohibited sexual conduct with that minor. Such a statutory construction would limit the chilling effect of the heckler's veto by focusing not on the claimed age of the communication's recipient, but instead on the intent of the speaker as reflected not only by the contents and nature of the communication at issue, but also in the discrete actions taken by the speaker to effectuate the "luring" conduct which lies at the heart of Penal Law §235.22's prohibitions.

Ironically, review of respondent's brief illustrates the need for a specific intent element. While the People maintain that they believe that no one would ever be prosecuted for mistakenly sending a proscribed e-mail message to the wrong address or otherwise engaging in innocent conduct, because the statute does not require an intent to communicate with a minor (as the People readily acknowledge), there is no guarantee that such prosecutions will not take place. Requiring that the People prove both a specific intent to communicate with a minor and an overt act taken in furtherance of a luring plan would, however, tend to narrow the application of the statute's proscriptions to that class of cases actually involving the

evil which the State Legislature sought to address through promulgation of Penal Law §235.22.

Indeed, reference to respondent's argument in Point IV that Penal Law §235.22 regulates only conduct reveals that even the People read a specific intent to communicate with a minor into the statute. As the People maintain:

> *First*, the person must transmit via the internet to the child a graphic image of sexual conduct. This requires an action on the part of the person. The person must select an image and then affirmatively send the image to a target via the internet. This is a conscious choice that the person makes and a conscious action on their part. This action -- the sending of the graphic images -- is crucial to the pedophile's goal. The pedophile sends the graphic image to the child to desensitize the victim to sexual taboos. The pedophile tries to break down any reluctance or uneasiness that the child may have regarding sexual activity by sending the child pictures of people, possibly children, engaged in sexual activity. The pedophile tries to convince the child that sexual activity, even with children, is "okay." This is one of the oldest forms of persuasion known to man -- "Come on, everybody's doing it. It's fun! Give it a try!" By breaking down the child's inhibitions, the child becomes an easier target for the pedophile.

The paradox could not be more obvious. The People maintain that Penal Law §235.22 does not require the prosecutor to prove that the defendant intended to communicate with a minor, yet defend against a challenge to the constitutionality of the statute by focusing on the fact that, in order to violate the law, the accused

must make a "conscious choice" to communicate with a child and must take "conscious action" to send the child a nude or sexually explicit image. This sounds remarkably similar to the definition of "intentionally" set forth in Penal Law §15.05(1): "A person acts intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct."

Furthermore, respondent's rather limited view of the potential applications of Penal Law §235.22 is entirely self-serving. For example, the People posit that one could not be prosecuted for engaging in sexual discussion and contemporaneously sending sexually explicit images in a chat room in which a minor is eavesdropping. Appellant submits, however, that the plain text of Penal Law §235.22 imposes no such restriction on law enforcement officials when deciding whether to apply the law to such chat room expression. The statute merely requires that the People prove that the accused used "any computer communication system" to engage in a communication with a minor during which he importunes, invites or induces the minor to engage in proscribed sexual conduct and during which communication he sends a depiction containing actual or simulated nudity, sexual conduct or sado-masochistic abuse which is harmful to minors. Obviously, by its very terms and by admission of respondent, the statute as it is presently written does not require a specific intent to communicate with a minor nor knowledge of the recipient's status as a minor. Consequently, any communication with a minor which meets the requirements set forth in Penal Law §235.22 is subject to prosecution, whether or not the Oneida County District Attorney's Office believes that such prosecution will actually take place. Consequently, if an Internet speaker in a chat room communicates with multiple individuals concerning a desire to engage in sexual conduct with other chat room participants and contemporaneously with that communication sends a nude or sexually explicit image to those chat room

participants, he is subject to prosecution if, in fact, a member of his audience is an actual minor.

Interestingly, respondent fails to counter appellant's contention that, because of the geographically-borderless nature of the Internet, New York's community standard as to what is obscene as to children will be exported beyond its territorial limits, requiring Internet users outside New York to tailor the content of their otherwise lawful sexually-oriented expression to that which is fit for children under New York's prevailing standards. See, People v. Barrows, supra at 729, 677 N.Y.S.2d at 683. In that Penal Law §235.22 may thus restrict a substantial amount of constitutionally protected expression on its way to achieving a more limited objective, the overbreadth of the statute is apparent.

Appellant consequently requests that this Court find that Penal Law §235.22 reaches more protected speech than is constitutionally permissible and hold that the statute is, therefore, overbroad in violation of the State and Federal Constitutions.

POINT II

PENAL LAW §235.22 VIOLATES THE COMMERCE CLAUSE AND IS THEREFORE INVALID

In attempting to tie the determination as to whether Penal Law §235.22 violates the Commerce Clause to whether there exists any legitimate businesses which have the purpose of luring minors into elicit sexual activity, the People have moved the discussion off the point of relevancy. Rather, the important question which must be resolved is whether the effect of Penal Law §235.22's prohibitions on certain types of speech have a more than "incidental" impact upon interstate commerce.

The applicable standard is not in dispute. If a state statute effectuating a legitimate local interest has only an *incidental* effect on interstate commerce, the statute will not be found to violate the Commerce Clause "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844 (1970).

Since appellant does not challenge the legitimacy of the state's interest in protecting its children from pedophilic activity, the controversy necessarily centers on whether the effect of Penal Law §235.22 on interstate commerce is merely incidental. Appellant submits that, as the Court in People v. Barrows, 177 Misc.2d 712, 677 N.Y.S.2d 672 (1998), found, the applicability statute's penal sanctions for the utterance of "mere words" quite obviously will have a substantial impact upon legitimate commerce occurring outside New York State's territorial orders.

As respondent acknowledges and as the courts have recognized (see, e.g., Reno v. American Civil Liberties Union, supra; American Libraries Ass'n v. Pataki, 969 F.Supp. 160 [S.D.N.Y. 1997]), there are a multitude of legitimate businesses in this country and worldwide who lawfully sell and distribute sexually explicit materials over the Internet. The Commerce Clause analysis is concerned with the effect of Penal Law §235.22 on the trade of these legitimate businesses, whether they be wholesalers, retailers or simple bulletin board operators who attract visitors to their web pages by posting lawful sexually explicit images or erotica in the hopes that the web page visitors will patronize the Internet firms which advertise on the web site. The Commerce Clause analysis does not turn on the proverbial straw man set up by the People: whether commercial entities with the illegal purpose of using Internet communications to lure children into sexual conduct -- should any such businesses actually exist -- are effected more than

incidentally by the proscriptions of New York's criminalization of certain Internet-based communications.

The distinctive aspect of Penal Law §235.22 which lies at the heart of its excessive impact on interstate commerce is the fact that Internet users, wherever they are located, risk penal sanctions for engaging in mere speech. Contrary to the People's representations, the "luring prong" of Penal Law §235.22(2) does not limit the reach of the statute to New York's territorial borders. Because Penal Law §235.22 does not contain safeguards designed to limit its application to intentional luring conduct occurring within New York State, the New York State legislature has cast its net worldwide to ensnare those few people (in relation to the hundreds of millions who use the Internet for legitimate purposes) who engage in predatory luring activity involving children within the State's boundaries.

Respondent's contention that CPL §20.20 somehow limits the reach of Penal Law §235.22 to wholly intrastate conduct is specious. Because the Internet user need not -- indeed, often does not -- know the identities of the recipients of his communication or their locations, and given that Penal Law §235.22 does not require knowledge that the recipient of the communication is a New York minor or a specific intent to communicate with a New York minor, Internet users all across the country run the risk of unwittingly having communications with actual minors prohibited under New York law during adult-oriented chat room discussions, bulletin board operations, multiple-recipient e-mail mailings, etc.

The pervasive nature of the Internet ensures that the reach of Penal Law §235.22 does not terminate at New York's geographical borders. As noted by the District Court in American Civil Liberties Union v. Johnson, 4 F.Supp.2d 1029 (D.N.M. 1998), "[i]t is impossible for speakers using electronic mail, mail

exploders, Internet Relay Chat, USENET newsgroups, Web-based discussion groups, and the World Wide Web to determine the geographic location of persons who access their speech." Id. at 1032. A similar observation was made by the Barrows Court, which commented:

> There is presently no practical way to control the dissemination or receipt of communications. It is not uncommon for an Internet user to receive uninvited commercial or personal solicitations, photographs and other messages from anywhere in the world. Nor is it possible for the "speaker" to control with certainty the route or ultimate destination of his or her message. The standards of propriety are no longer confined to those of a particular geographic or political community.

People v. Barrows, 177 Misc.2d 712 at 725, 677 N.Y.S.2d at 681.

Take, for instance, this example. An Internet user in Los Angeles, California, logs on to his computer at home. He enters what he believes to be an adult-oriented chat room for the purpose of engaging in "cyber sex" with other consenting adults while also exchanging non-obscene sexually explicit images with those present in the chat room. During the course of this "hot chat," the Los Angeles Internet user engages in Internet relay chat with several other anonymous Internet users who he assumes are adults, and whose actual physical locations are unknown to him. As part of this cyber sex experience, he either fantasizes online about meeting one or more of the chat room participants for the purpose of having sexual contact or outright propositions one or more chat room participants. Ultimately, it turns out that one of the chat room participants is a minor from Potsdam, New York.

Under the facts of this hypothetical, it can fairly be assumed that if the District Attorney in Potsdam, New York wished to prosecute the Los Angeles Internet user, he could readily claim that the Los Angeles Internet user communicated with a New York minor (even though he did so unintentionally) and used a computer system to engage in this communication, all in violation of Penal Law §235.22(1); importuned, invited or induced the New York minor to engage in sexual contact with him, in violation of Penal Law §235.22(2); and transmitted to the New York minor a nude or sexually explicit depiction which is believed to be harmful to minors under New York State standards. Penal Law §235.22(1). Further, a prosecution could lie even though the Internet user in Los Angeles never took a single step to bring his fantasy to fruition. This potential for prosecution may cause Internet speakers to engage in self-censorship, thereby suppressing lawful expression which might otherwise have been communicated via chat rooms operated or sponsored by commercial entities.

Moreover, if, as argued by the People at trial, it is illegal to communicate with a New York minor online and encourage him or her to masturbate while providing the minor with nude or sexually explicit images, then the commercial web site operator which encourages its web site visitors to download non-obscene but sexually explicit images for the purposes of their self-gratification during masturbation or other sexual conduct, is potentially subject to criminal prosecution should that web site be accessed by a minor, even though the web site operator's own state may not place any burden on him to verify the visitor's age or use credit card screening. Likewise, a small or sole proprietor modeling studio in another state may run afoul of the proscriptions of Penal Law §235.22 if, under the laws of that other state, the studio is under no obligation to request identification, use an age verification service, or otherwise verify the age of its web site visitors. For example, the studio's web site could contain nude or erotic imagery which it uses

as part of its pitch to encourage potential models to send in their own nude or erotic photographs for evaluation as to the potential for employment as a model. If a New York minor accesses the site and downloads a nude image, then decides to forward a nude photo of herself to the studio for evaluation, all of the requirements for a prosecution under Penal Law §235.22 have arguably been met.

A similar hypothetical could involve an adult dating service based outside of New York which is under no obligation in its home state to engage in any type of age verification activity. This type of commercial Internet entity could make its money charging a fee to other Internet users who wish to post a personal ad on the company's web site seeking a sexual liaison with another Internet user and accompanied by a nude or sexually explicit photograph. If the Internet company's clientele will be exposed to the potential for criminal prosecution under New York law if a New York minor accesses the web site and agrees to meet one of the clients for the purposes of engaging in sexual intercourse or sexual contact, the negative impact of Penal Law §235.22 on such commercial activity is obvious.

Another example is the commercial web site operator who runs an Internet bulletin board which generates revenue for said web site operator based on the number of times visitors to the bulletin board "click" on banner advertisements marketing other Internet-based firms. If this web site operator posts various nude or sexually explicit images on the bulletin board -- all non-obscene in nature and thereby considered deserving of constitutional protection -- and encourages visitors to the web site to contribute their own nude or erotic images for posting on the bulletin board, he runs a risk of prosecution under New York law if the web site is accessed by a minor in New York State. Under these facts, the web site operator has used a computer system to engage in a communication with a minor (even though it was done unknowingly and

unintentionally), and has importuned, invited or induced said minor to engage in a sexual performance for his benefit while providing that minor with nude or sexually explicit images which may be deemed "harmful to minors" under New York law.

These are just a few examples of commercial Internet activity, legitimate in nature, which are effected by the prohibitions of Penal Law §235.22. While it is impossible to precisely assess the chilling effect of the potential for enforcement of New York's criminal standards on Internet communications which are not intentionally targeted at New York minors, it is possible to conclude that the New York statute's effect on interstate commerce is not simply "incidental." Indeed, because Penal Law §235.22 does not require a specific intent to communicate with a New York minor and does not require that the People prove that the accused Internet speaker took any overt steps to effectuate the goal of the alleged luring attempt, the law may be used to proscribe pure speech which is interpreted by some as importuning, inviting or inducing a minor to engage in prohibited sexual conduct.

Finally, given the unique nature of the Internet as a borderless communication system, only a national regulation scheme can provide Internet users with reasonable notice as to the legality of their communications (or lack thereof). In the absence of uniform national standards with respect to unlawful Internet communications, each individual state will be free to enact its own prohibitions which, in the absence of appropriately restrictive elements of proof, may cause the exportation of that state's unique standards (i.e., community standards concerning what is obscene as to minors) to Internet communication initiated under the standards applied to a speaker in another state. Analogizing the Internet to a highway or railroad is appropriate and the prediction that inconsistent state regulatory schemes "could paralyze the development of the Internet

altogether" is reasonable. American Libraries Ass'n v. Pataki, 969 F.Supp. 160, 181-82 (S.D.N.Y. 1997).

Accordingly, because the impact of Penal Law §235.22 on interstate commerce is more than incidental, appellant respectfully submits that the statute violates the Commerce Clause of the United States Constitution and is, therefore, invalid.

POINT III

PENAL LAW §235.22 IS UNCONSTITUTIONALLY VAGUE AND MUST BE DECLARED VOID

With respect to Point III, appellant relies on the argument set forth in his principal brief on appeal.

POINT IV

PENAL LAW §235.22 IS A CONTENT-BASED RESTRICTION ON SPEECH WHICH CANNOT SURVIVE STRICT SCRUTINY

Contrary to respondent's contentions, Penal Law §235.22 is not a content-neutral time, place and manner restriction. As the Appellate Division, Fourth Department, correctly found, "The purpose of the statute here is to protect children from the primary effects of the transmission of offensive speech, and thus the statute is a content-based restriction on speech." People v. Foley, 257 A.D.2d 243, 252, 692 N.Y.S.2d 248, 255 (citations omitted). Appellant submits that this content-based speech restriction is unconstitutional because it cannot survive strict scrutiny.

As this Court explained in Matter of Town of Islip v. Caviglia, 73 N.Y.2d 544, 556-57, 542 N.Y.S.2d 139, 145 (1989):

> Governmental action may restrict speech either intentionally or incidentally. Intentional restrictions are directed at the message conveyed, either its content or the time, place and manner in which it is disseminated. Generally speaking, if the regulation is content-based it is presumptively invalid and therefore subject to strict scrutiny. However, content-neutral restrictions, those justified without reference to the content of the regulated speech and relating only to the time, place, and manner of expression, are valid if the governmental interest to be achieved outweighs the resulting interference with free expression.

Penal Law §235.22 plainly regulates the content of Internet communications and the direct effect of the content of such speech on children. For instance, the prosecutor is required to prove that the accused Internet speaker used a computer system to engage a minor in a communication "which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors." Penal Law §235.22(1). Furthermore, under subsection 2 of Penal Law §235.22, the prosecutor is required to show, by the content of the accused's speech, that he importuned, invited or induced a minor to engage in certain delineated sexual conduct. Penal Law §235.22(2).

The People cannot escape the fact that Penal Law §235.22 is a presumptively invalid content-based restriction on speech merely by analogizing the Internet to a "place" in which the Legislature was trying to limit adverse secondary effects of protected speech. While both this Court and the United States Supreme Court have recognized the validity of Government zoning regulations intended to ameliorate the adverse secondary effects of adult speech generated by such establishments as adult theaters and bookstores (e.g., diminishment of property values, creation of blighted areas in the

community, increased criminal activity, etc.), the predominant purpose of such regulations is not directed at the effect of such speech on the listener, but rather is directed at controlling the incidental effect of allowing such speech to occur within the community. See, City of Renton v. Playtime Theatres, 475 U.S. 41, 106 S.Ct. 925 (1986); Matter of Town of Islip v. Caviglia, supra at 554, 542 N.Y.S.2d at 144 [where this Court concluded that "[t]he Town's ordinance does not impose any limitation on the content of the material or the ability of the creators or sellers to distribute it and it does not restrict in any significant way those wishing to acquire adult books from doing so"].

Here, contrary to the typical restrictions imposed on the time, place and manner in which adult use establishments are permitted to operate within a community, Penal Law §235.22 prohibits certain speech. Under no circumstances is an Internet speaker allowed to communicate nude or sexually explicit images to a minor while using words which importune, invite or induce that minor to engage in specific kinds of sexual conduct. This is not a situation where the statute at issue permits such speech to occur, but only under certain circumstances. Consequently, there can be no dispute that Penal Law §235.22 is "a purposeful attempt to regulate speech" requiring strict scrutiny analysis. Matter of Town of Islip, supra at 557, 542 N.Y.S.2d at 557; see also, Stringfellow's of New York, Ltd. v. City of New York, 91 N.Y.2d 382, 397, 671 N.Y.S.2d 406, 414 (1998).

Significantly, the People fail to address appellant's contention that, in enacting Penal Law §235.22, the New York State Legislature failed to utilize the least restrictive means to further its articulated interest in protecting children from sexual abuse arranged through Internet communication. Rather, respondent merely repeats the assertion that the statute is not content based. Ironically, perhaps the best indicator that the focus of Penal Law §235.22 is the speech

used by the accused can be found in respondent's urging of this Court to examine "the vilest most despicable language" purportedly used by appellant during the Internet chat discussions pertinent to this case (see, Respondent's Brief at p.41).

Appellant maintains that the Legislature failed in its obligation to use sufficiently precise tools in achieving its objective of eliminating predatory activity targeted at minors through Internet communication. As appellant noted in his principal brief on appeal, rather than limiting the statute's proscriptions to those who intentionally communicate with a minor and who overtly take steps to accomplish an actual inducement of a minor engaged in delineated sexual conduct -- obviously, the ameliorative objective of the statute -- the Legislature instead enacted a regulation which subjects speakers to the risk of prosecution and penal sanctions irrespective of their actual knowledge or intent in engaging in the communication. Thus, the means utilized to achieve the child protective purpose of Penal Law §235.22 are much broader than necessary and do not survive strict scrutiny.

Accordingly, appellant respectfully requests that this Court hold that Penal Law §235.22 is a content-based restriction on speech which is presumptively invalid and which does not survive strict scrutiny.

POINT V

PENAL LAW §263.15 IS OVERBROAD IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS

The People incorrectly maintain that appellant's challenge to the constitutionality of Penal Law §263.15 should more properly be considered a challenge to the legal sufficiency of the evidence

supporting appellant's conviction under this statute. Appellant's constitutional challenge premised on the overbreadth of Penal Law §263.15 is clear on the face of his principal brief on appeal and, further, appellant would note that the legal sufficiency of the evidence supporting appellant's conviction for promoting the sexual performance of a child is set forth in Point VI of the principal brief.

With respect to the merits of appellant's overbreadth argument, the People merely counter that this Court found Penal Law §263.15 to be constitutional in People v. Ferber, 57 N.Y.2d 256, 455 N.Y.S.2d 582 (1982). This response does not address the serious issues raised by appellant with respect to impermissibly overbroad application of the statute in the absence of a requirement that the sexual performance at issue depict an actual minor.

It cannot be gainsaid that Penal Law §263.15 was enacted to combat the risk of physical and psychological harm caused to real children who are used in the production of child pornography. New York v. Ferber, 458 U.S. 747, 758, 102 S.Ct. 3348, 3355 (1982) ["[t]he legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional and mental health of the child"]. The compelling state interest in eliminating such child abuse and the narrow scope of its application "to works that *visually* depict sexual conduct by children below a specified age," permitted this content-based restriction on speech to survive strict scrutiny. New York v. Ferber, supra at 763-64, 102 S.Ct. at 3358 (emphasis in original). Indeed, the Supreme Court's 1982 rejection of defendant Ferber's claim that the overbreadth of Penal Law §263.15 would result in the suppression of protected expression "ranging from medical textbooks to pictorials in the National Geographic" was premised on the belief that it was unlikely that it would be "necessary to employ children" to engage in a

sexual performance in order to produce *bona fide* educational, medical or artistic works. Id. at 773, 102 S.Ct. at 3363.

Today's technology, however, permits the creation of visual depictions of people who appear to exist in reality, but who are actually fictional creations [1016-17]. In fact, the Internet expert who testified for the defense at the instant trial explained that sometimes graphic images are created or altered so well that it would be difficult for even an expert to determine whether the image represents an actual object or person in reality or is simply a fictional representation [1014-18]. The People's main witness, New York State Trooper Mark Williams, corroborated the expert's testimony concerning the capabilities of present-day graphics design technology [737-41].

Consequently, appellant submits that, in the absence of proof that the individuals depicted in the graphic images offered at trial are or were real children engaged in actual sexual performances, appellant cannot be properly convicted of violating Penal Law §263.15. Unless a conviction under this statute is premised on a finding beyond a reasonable doubt that the child depicted in the suspect image is or was real, the legitimate government interest justifying suppression of such expression does not exist.

This issue was recently addressed by the Ninth Circuit Court of Appeals in Free Speech Coalition v. Reno, ___ F.3d ___ (1999 U.S. App. LEXIS 32704) (December 17, 1999). In that case, the Free Speech Coalition argued that those provisions of the Child Pornography Prevention Act of 1996 which prohibited visual depictions which even appeared to be of a minor engaging in sexually explicit conduct are impermissible content-based restrictions on protected speech and are unconstitutionally overbroad. 18 U.S.C. §2256(8)(B).

In finding that the Child Pornography Protection Act provisions did not survive strict scrutiny analysis and were substantially overbroad, the Ninth Circuit addressed the rationale advanced by the Supreme Court to justify the constitutionality of Penal Law §263.15 in New York v. Ferber, supra:

> The Supreme Court has required state statutes criminalizing child pornography to limit the offense to "works that *visually* depict explicit sexual conduct by children below a specified age." Ferber, 458 U.S. at 764. The Ferber Court specifically focused on the harm to children. See, 458 U.S. at 758. It also found that distribution of pornographic images is "intrinsically related" to the harm suffered by child victims because the images produced are a permanent record of the child's participation, exacerbated by its dissemination. See, id. at 759. The Court reasoned that the distribution network for such images needs to be terminated if it is to be effectively controlled. See, id. The Ferber Court acknowledged that "if it were necessary for literary or artistic value, a person over the statutory age who perhaps looked younger could be utilized." Id. at 763.
>
> The language of the statute questioned here can criminalize the use of fictional images that involve no human being, whether that fictional person is over the statutory age and looks younger, or indeed, a fictional person under the prohibited age. Images that are, or can be, entirely the product of the mind are criminalized. The CPPA's definition of child pornography extends to drawings or images that "appear" to be minors or

> visual depictions that "convey" the impression that a minor is engaging in sexually explicit conduct, whether an actual minor is involved or not. The constitutionality of this definition is not supported by existing case law.
>
> The rationale articulated in Ferber and the constitutional permissibility of regulating the category of child pornography as a separate class is not justified by consideration of the effects such images have on others, even if those effects exist. Instead the focus of analysis is on the harm to the children actually used in the production of the materials. Nothing in Ferber can be said to justify the regulation of such materials other than the protection of the actual children used in the production of child pornography. The language of the statute criminalizes even those materials that do not involve a recognizable minor. This shift is a significant departure from Ferber. While the government is given greater leeway in regulating child pornography, materials or depictions of sexual conduct "which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection." Ferber, 458 U.S. at 765.

Free Speech Coalition v. Reno, supra (footnote omitted).

The Ninth Circuit ultimately concluded that Congress' compelling interest in eliminating the physical and psychological harm caused to actual children who are used in the process of producing child pornography does not exist where no actual children were involved in the visual depiction in question. Significantly, the Court observed:

> By criminalizing all visual depictions that "appear to be" or "convey the impression" of child pornography, even where no child is ever used or harmed in its production, Congress has outlawed the type of depictions explicitly protected by the Supreme Court's interpretation of the First Amendment. Because the 1996 Act attempts to criminalize disavowed impulses of the mind, manifested in illicit creative acts, we determine that censorship through the enactment of criminal laws intended to control an evil idea cannot satisfy the constitutional requirements of the First Amendment.

Free Speech Coalition v. Reno, supra at 28.

The Ninth Circuit also held that the Child Pornography Protection Act was overbroad insofar as it restricted non-obscene sexual expression which did not involve actual children. Interestingly, the Court specifically commented on the Senate's recognition that when New York v. Ferber was decided in 1982, "the technology to produce visual depictions of child sexual activity indistinguishable from unretouched photographs of actual children engaging in 'live performances' did not exist." Free Speech Coalition v. Reno, supra at 33, quoting S. Rep. No. 104-358, at 21 (1996).

While Penal Law §263.15 does not specifically proscribe the creation of visual depictions of fictional children engaged in sexual performances, the absence of a requirement that the prosecutor prove and the jury find that the visual depiction at issue involved an actual child creates the same risk of suppression of protected expression. Consequently, Penal Law §263.15 should be declared overbroad in violation of the First Amendment of the United States Constitution and Article I, Section 8 of the New York

State Constitution, and appellant's convictions under the statute should be reversed.

POINT VI

APPELLANT'S CONVICTIONS FOR PROMOTING THE SEXUAL PERFORMANCE OF A CHILD IN VIOLATION OF PENAL LAW SECTION 263.15 ARE NOT SUPPORTED BY LEGALLY SUFFICIENT EVIDENCE

With respect to Point VI, appellant relies on the argument set forth in his principal brief on appeal.

POINT VII

THE TRIAL COURT'S RESTRICTION OF CROSS-EXAMINATION BY APPELLANT DENIED APPELLANT'S CONSTITUTIONALLY PROTECTED RIGHT AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 6 OF THE NEW YORK STATE CONSTITUTION

With respect to Point VII, appellant relies on the argument set forth in his principal brief on appeal.

POINT VIII

THE PROSECUTION FAILED TO ESTABLISH AN UNBROKEN CHAIN OF CUSTODY FOR CRUCIAL PHYSICAL EVIDENCE

With respect to Point VIII, appellant relies on the argument set forth in his principal brief on appeal.

CONCLUSION

Appellant reiterates his request that this Court reverse the decision and order of the Appellate Division, Fourth Department, affirming his convictions and dismiss the indictment or, in the alternative, grant him a new trial.

DATED: January 7, 2000

Respectfully submitted,

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
PAUL J. CAMBRIA, JR., ESQ.
ROGER W. WILCOX, JR., ESQ.

By /s/
ROGER W. WILCOX, JR.

Attorneys for Defendant/Appellant
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

STATE OF NEW YORK
COURT OF APPEALS

----------x

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

THOMAS R. FOLEY, SR.,

Defendant-Appellant.

----------x

BRIEF OF THE STATE OF NEW YORK AS INTERVENOR

ELIOT SPITZER
Attorney General of the
State of New York
Attorney for Intervenor
120 Broadway
New York, New York 10271
(212) 416-8370

PREETA D. BANSAL
Solicitor General

ROBIN A. FORSHAW
MARK H. LEVINE
JAMES M. HERSHLER
Assistant Attorneys General
of Counsel

February 2, 2000

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STATE OF NEW YORK
COURT OF APPEALS

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

THOMAS R. FOLEY, Sr.

Defendant-Appellant.

----------x

BRIEF FOR INTERVENOR

Preliminary Statement

Pursuant to Executive Law § 71, the Attorney General submits this brief in support of the constitutionality of Penal Law § 235.22, Disseminating Indecent Material to Minors in the First Degree, and Penal Law § 263.15, Promoting a Sexual Performance by a Child. Defendant Thomas Foley was convicted under both of these statutes. The Attorney General's appearance in this case is for the sole purpose of supporting the constitutionality of the statutes in question and supplementing the brief submitted by the Oneida County District Attorney.

The Statute At Issue

Penal Law § 235.22 (disseminating indecent material to minors in the first degree) provides that:

> [a] person is guilty of disseminating indecent material to minors in the first degree when:
>
> 1. knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor; and
>
> 2. by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit.

For a defendant to be held liable under this statute, both of its prongs must be met.[1] Under the first prong, a defendant must disseminate over the Internet sexually explicit communications to a minor depicting nudity, sexual conduct, or sadomasochistic abuse that is harmful to minors. Penal Law § 235.20(6) defines harmful to minors as:

---

[1] In his moving brief, while citing to the statute, defendant mistakenly substitutes the word "or" between sections 1 and 2 of the statute (Defendant's Brief at 31).

> that quality of any description or representation, in whatever form, of nudity, sexual conduct, sexual excitement, or sado-masochistic abuse, when it:
>
> (a) Considered as a whole, appeals to the prurient interest in sex of minors; and
>
> (b) Is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and
>
> (c) Considered as a whole, lacks serious literary, artistic, political, and scientific value for minors.

For criminal liability to arise under the statute, a defendant must also satisfy the statute's second prong, which requires the defendant to lure a minor into sexual activity. See People v. Foley, 257 A.D.2d 243, 250 (4th Dept. 1999). The second prong proscribes the specific conduct of importuning, inviting or inducing a minor to "engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit." See Penal Law § 235.22(2).

There are also four ordinary defenses set forth in Penal Law § 235.23(3):[2]

> In any prosecution for disseminating indecent material to minors in the ... first degree pursuant to section 235.22 of this article, it shall be a defense that:

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[2] Both the Appellate Division and defendant erroneously refer to these defenses as "affinnative defenses." See, People v. Foley, 57 A.D.2d at 246; Defendant's Brief at 21.

(a) The defendant made a reasonable effort to ascertain the true age of the minor and was unable to do so as a result of actions taken by the minor; or

(b) The defendant has taken, in good faith, reasonable, effective and appropriate actions under the circumstances to restrict or prevent access by minors to materials specified in such subdivision, which may involve any appropriate measures to restrict minors from access to such communications, including any method which is feasible under available technology; or

(c) The defendant has restricted access to such materials by requiring use of a verified credit card, debit account, adult access code or adult personal identification number; or

(d) The defendant has in good faith established a mechanism such that the labelling, segregation or other mechanism enables such material to be automatically blocked or screened by software or other capabilities reasonably available to responsible adults wishing to effect such blocking or screening and the defendant has not otherwise solicited minors not subject to such screening or blocking capabilities to access that material or to circumvent any such screening or blocking.

Summary of Argument

New York's compelling interest in the "prevention of sexual children" has long been recognized. New York v. Ferber,

458 U.S. advance this interest of "surpassing importance," id., New York enacted various criminal statutes, including prohibitions on the dissemination of child pornography and on child endangerment through the use of obscenities to encourage children to perform immoral acts. These measures easily have survived constitutional challenges. People v. Ferber, 57 N.Y.2d 256, 259 (1982); People v. Rice, 17 N.Y.2d 881 (1966). The recent dramatic growth of the Internet has provided pedophiles with a new means -- namely high technology -- to commit the old crimes of sexual violence and child abuse. "[A]larmed at the growing use of computer networks and other communications by pedophiles," the New York legislature enacted Penal Law § 235.22 to deter and punish pedophiles who use the Internet to lure children into sexual activity. See Sponsors' Memorandum, Bill Jacket, L. 1996, ch. 600; see also Letter dated July 11, 1996 from State Senator William R. Sears to Governor Pataki, Bill Jacket, L. 1996, ch. 600.[3]

In violation of Penal Law § 235.22, defendant, a New York resident, intentionally used the Internet to send sexually explicit communication to another New Yorker he believed was a minor, attempting to induce that person to engage in sexual conduct.

Defendant raises a host of constitutional arguments to defeat the State's ability to protect children from sexual exploitation in this era of computer communication. He claims that Penal Law §235.22 is overbroad, vague, and a content-based statute that cannot survive strict scrutiny. 47, 757 (1982). All these arguments are without merit. Defendant falls far short of

[3] For the Court's convenience, copies of these documents are attached to the Attorney General's Brief as Exhibits A and B, respectively.

meeting his heavy burden of proving beyond a reasonable doubt that Penal Law § 235.22 is constitutionally invalid.

The statute is not overbroad in that it does not abridge the free speech rights of adults who merely converse about sexual matters over the Internet. Rather, Penal Law § 235.22 criminalizes only the conduct of those who transmit communications, which they know to be sexually explicit and "harmful to minors," and use those communications to lure or induce children into performing sexual acts. The Oneida County District Attorney correctly argues that the dual-pronged nature of Penal Law § 235.22 and the availability of an ordinary defense for those who make a reasonable effort to ascertain the age of the person with whom they have communicated defeats defendant's overbreadth challenge. Moreover, the statute is capable of a reasonable limiting construction: i.e., it may be construed to apply only to a defendant who transmits sexually explicit communication intentionally targeted to a minor in order to lure that minor into sexual activity. Not one of the federal cases on overbreadth relied upon by defendant addresses the constitutionality of a statute such as Penal Law § 235.22, which has both such requirements.

Indeed, it is the requirement set forth in the statute's second prong (that, by the means of the sexually explicit communication, a defendant "importunes, invites or induces a minor to engage in sexual ... conduct for his benefit") that defeats all of defendant's free speech arguments. See Penal Law § 235.22(2). These terms are hardly unconstitutionally vague as their common and ordinary meanings and the context in which they are used provides sufficient notice of the prohibited conduct. Sexually explicit communication when used to lure minors to engage in sexual conduct is inherently harmful and therefore, like a threat, harassment or solicitation, is not communication safeguarded by the First Amendment. Given the compelling state

interest in protecting children from sexual exploitation, Penal Law § 235.22 passes constitutional muster under the strict scrutiny test, even if viewed as a content-based regulation on speech.

In addition, defendant's Commerce Clause argument must fail. The enactment and enforcement of Penal Law § 235.22 is a legitimate exercise of the State's police powers, especially here where the conduct at issue was entirely intrastate: defendant and the intended recipient of the sexually explicit material were both located in New York. Even if the Court were to find an effect on interstate commerce, under these circumstances, the State's interest in preventing sexual exploitation of children must prevail.

Finally, with respect to Penal Law § 263.15, defendant's challenges to the constitutionality of the statute previously have been rejected by this Court and the Supreme Court, and his overbreadth arguments are so speculative that they provide no legitimate basis to overturn this statute.

POINT ONE

PENAL LAW § 235.22 COMPLIES WITH THE FREE SPEECH PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS BECAUSE IT IS NARROWLY TAILORED TO EFFECTUATE THE STATE'S COMPELLING INTEREST IN PROTECTING CHILDREN FROM PEDOPHILES WHO SEEK TO USE THE INTERNET TO LURE THEM INTO SEXUAL ENCOUNTERS

A defendant challenging the constitutionality of a statute faces a "heavy burden" of showing that the statute is invalid. People v. Bright, 71 N.Y.2d 376, 382 (1988). Because a legislative enactment "is presumed to be valid," id., a state statute

"will be stricken as unconstitutional only as a last resort." People v. Davis, 43 N.Y.2d 17, 30 (1977), cert. denied, 435 U.S. 998 (1978); see also People v. Epton, 19 N.Y.2d 496, 505 (1967), cert. denied, 390 U.S. 29 (1968) (a court must assume that the legislature intended to enact a statute "in harmony" with both the state and federal constitutions). For a defendant to prevail, he or she must prove that Penal Law § 235.22 is unconstitutional beyond a reasonable doubt. See Fenster v. Leary, 20 N.Y.2d 309, 314 (1967). Because defendant has not and cannot show beyond a reasonable doubt that the challenged statute violates the free speech provisions of the state and federal constitutions, the Fourth Department's decision upholding the constitutionality of Penal Law § 235.22 must be affirmed.

A. Defendant Has Not Met His Heavy Burden of Proving That Penal Law § 235.22 is Overbroad

The overbreadth doctrine is an exception to the "general rule" that an individual may not challenge the constitutionality of a statute on behalf of third parties. See People v. Hollman, 68 N.Y.2d 202, 208 (1986). The doctrine, which applies only in the First Amendment context, permits a defendant whose own free speech rights are not violated by a statute to argue that a "Statute's facial ability to reach protected conduct is so broad that its continued application may chill the lawful exercise of [other] citizens' right to freedom of speech." Id.; see also Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 503 (1985). The overbreadth doctrine, however, is "strong medicine" and is to be applied "sparingly and only as a last resort." See Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973); see also, New York v. Ferber, 458 U.S. at 769. The "mere fact that one can conceive of some impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." Member of City Council v. Taxpayers for Vincent 466 U.S. 789, 800 (1984); see

also, Osborne v. Ohio, 495 U.S. 103, 112 (1990). Instead, a defendant may challenge a statute as overbroad "only when the statute's unconstitutional reach is substantial" (People v. Hollman, 68 N.Y.2d at 208), and the "State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech." Secretary of State of Md. v. Joseph H. Munson Co., 467 U.S. 947, 967-68 (1984); see also, Osborne v. Ohio, 495 U.S. at 112 ("we have repeatedly emphasized that where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but substantial as well, judged in relation to the statute's plainly legitimate sweep'") (citation omitted). Finally, a statute will not be struck down pursuant to the overbreadth doctrine unless it is "incapable of a reasonable limiting instruction." People v. Hollman, 68 N.Y.2d at 208; see also Broadrick v. Oklahoma, 413 U.S. at 613.

1. Defendant fails to demonstrate any real or substantial overbreadth of Penal Law § 235.22, especially in light of the state's legitimate interest in preventing sexual exploitation of children.

Defendant falls far short of meeting his heavy burden of demonstrating that the alleged overbreadth of Penal Law § 235.22 is real and substantial given the State's plainly legitimate sweep in protecting children from sexual exploitation. See New York v. Ferber, 458 U.S. at 757. The state's interest in "safeguarding the physical and psychological well-being of a minor" is "compelling." Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982). The prohibitions in this law are necessary to protect children from new dangers made possible by technological advances. See Exhibit C, Governor's Approval Memorandum, Bill Jacket L. 1996, ch. 600; see also Mark S. Kende, Lost in

Cyberspace: The Judiciary's Distracted Application of Free Speech and Personal Jurisdiction Doctrines to the Internet, 77 Or. L. Rev. 1125, 1162-63 (1998) ("the most serious harm caused by the Internet so far involves predatory adults who use chat rooms connected to sexually explicit sites as a way of luring children ... into a rendezvous which ends in sexual violence or death").

Defendant suggests a wide range of protected speech ostensibly reached by Penal Law § 235.22. But defendant's argument asks this Court to ignore the statute's second prong -- the use of sexually explicit communication to lure a minor into sexual conduct. And, as the Oneida County District Attorney effectively recounts, the existence of this requirement means that the statute does not reach numerous circumstances of sexually explicit conversations between adults. See District Attorney's Brief at 21-25. The District Attorney correctly argues that the dual-pronged nature of Penal Law § 235.22, along with the ordinary defense that precludes liability if a person makes a reasonable effort to ascertain the age of the person with whom he or she has communicated insulates the statute from any potential overbreadth claims.

2. Any overbreadth in Penal Law § 235.22 can be cured if the statute is interpreted to require the People to prove that a defendant both intended to transmit sexually explicit communications to a minor and intended to lure that minor into sexual activity.

Even if this Court were not persuaded by the analysis set forth by the Oneida County District Attorney and concludes that Penal Law § 235.22 somehow suffers from real and substantial overbreadth even in light of the statute's plainly legitimate sweep,

this Court's overbreadth jurisprudence precludes it from holding the statute unconstitutional. As long as a statute is capable of a reasonable limiting construction, a court cannot strike it down pursuant to the overbreadth doctrine. See People v. Hollman, 68 N.Y.2d at 208; see also Broadrick v. Oklahoma, 413 U.S. at 613 ("[f]acial overbreadth has not been invoked when a limiting construction has been or could b e placed on the challenged statute"). For a limiting construction to be reasonable, it "must be one which the court 'may reasonably find implicit' in the words used by the Legislature[.]'" People v. Dietze, 75 N.Y.2d 47, 52 (1989) (quoting People ex rel. Morriale v. Branham, 291 N.Y. 312, 317 (1943)).

Here, there exists a limiting construction supported both by the language of the statute and its legislative history. The first prong of Penal Law § 235.22 provides that a person is guilty of disseminating indecent material to a minor if:

> knowing the character and content of the communication, which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who is a minor.

Due to the location of the word "intentionally" at the beginning of this phrase, it is reasonable to read that word as modifying everything that follows, i.e., as requiring that the defendant transmit the proscribed communication intentionally to a minor. See McKinney's Cons. Laws of NY, Book 1, Statutes

§ 232 at 392 ("It is a general rule in the interpretation of statutes that the legislative intent is primarily to be determined from the language used in an act, considering the language in its most natural and obvious sense."); see also McKinney's Cons. Laws of NY, Book 1, Statutes § 272 at 440 ("The cardinal rule in interpreting penal statutes is to give effect to the intention of the legislative body which enacted them, and such intention is determined from the language used, giving to the words their ordinary meaning."). This analysis is also consistent with the well-settled rule of statutory construction that "if it is practicable to avoid a construction of a [penal] statute which eliminates intent as an element of a crime, the courts will do so." See McKinney's Cons. Laws of NY, Book 1, Statutes § 274 at 443; United States v. X-citement Video, Inc., 513 U.S. 64, 68-69 (1994).[4] Cf. Penal

[4] In X-citement Video the Court interpreted 18 U.S.C. § 2252 (a provision of the Protection of Children Against Sexual Exploitation Act of 1977), which outlawed the interstate transportation of child pornography. The statute, in pertinent part, imposed liability on any person who: "(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual description, if -- (A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and (B) such visual depiction is of such conduct." The Court held that the term "knowingly" used in subsection (1) to modify the transportation element of the statute also applied to the phrase "use of a minor" in subsection (1) (A). See 513 U.S. at 68. Although this was not the most grammatically correct reading of the statute, the Court ruled that without requiring an actor to actually know that the materials transported involved the use of minors, it would produce an "absurd" result because the statute would sweep within its ambit "actors who had no idea that they were even dealing with sexually explicit material." Id. at 69. Moreover, the Court based its decision on its earlier cases that interpreted "criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them." Id. at 70.

Law § 15.15(l) (if a statute contains only one reference to a particular mental state, such as "intentionally," there is presumption that it applies "to every element of the offense unless an intent to limit its application clearly appears").

Construing the language in the first prong of Penal Law § 235.22 to limit liability to those defendants who transmit the proscribed communications intentionally to minors necessarily incorporates the intent requirement into the second prong. After all, Penal Law § 235.22(2) provides that:

> by means of such communication he importunes, invites or induces a minor to engage in sexual intercourse, deviate sexual intercourse, or sexual contact with him, or to engage in a sexual performance, obscene sexual performance, or sexual conduct for his benefit. The sexually explicit communication intentionally transmitted to the minor is the "means" by which the defendant must importune, invite or induce the minor to engage in sexual activity.

Indeed, the words "importune ... .. invite," or "induce," although not defined by the Penal Law, are each words that, in their plain meanings, contemplate purposeful conduct. Webster's Dictionary defines "importune" as "to press or urge with frequent or unreasonable requests or troublesome persistence." See Webster's Third New International Dictionary at 1135 (1981). The same conscious or deliberate conduct is contemplated by the word "induce," which is defined as "to move and lead (as by persuasion or influence)" and "invite," defined as "to offer an incentive or inducement ... [or] to request the presence or participation of." See Id. at 1154, 1190. Based on this analysis, it is reasonable to construe Penal Law § 235.22 as imposing criminal liability only if

the People prove that a defendant targeted a minor in transmitting sexually explicit communications and intended to importune, invite or induce a person he or she reasonably believed to be a minor into sexual activity. See Donnino, Practice Commentary, McKinney's Cons. Laws of NY, Book 39, Penal Law § 235.00 at 286 (explaining that under Penal Law § 235.22, "the communication of the 'harmful to minors' material must be intentionally aimed at a minor for the purpose of seducing the minor to engage in prohibited sexual activity for the seducer's benefit").

Although the Court can accept the limiting construction based solely on the statute's language, it also is supported by the statute's legislative history. Indeed, State Senator William R. Sears, one of the sponsors of the legislation, wrote that:

> [t]he purpose of this bill is [to] deter individuals who would use computer networks to lure children into sexual relations by intentionally transmitting indecent materials to children through computer networks. The bill would not hold liable a computer network, on-line service provider, or any other individual who did not intentionally transmit the materials to minors.

Exhibit B, Letter dated July 11, 1996 from State Senator Williams R. Sears to Governor Pataki, Bill Jacket, L. 1996, ch. 600. Defendant's argument to the contrary places too much reliance upon Governor Pataki's Approval Memorandum. Admittedly in one part of his Approval Memorandum, the Governor stated that the bill does not require "proof that the defendant knew he was communicating, or intended to communicate, with a minor;" however, in another part of the Memorandum, the Governor stated that liability will be imposed under the statute if a defendant "intentionally uses any computer communication system to initiate

or engage in such communication with a person who he has reason to believe is a minor." See Exhibit C, Governor's Approval Memorandum, Bill Jacket, L. 1996, ch. 600.

In light of the statute's purpose and the plain language contained therein, this Court may reasonably construe Penal Law § 235.22 to require the People to prove that a defendant intentionally transmitted to a minor sexually explicit communications to lure that minor into performing a sexual act. This intent can be demonstrated, like in any other case, by reviewing the totality of the actions taken by the adult with respect to the minor that has been victimized. See Donnino, Practice Commentary, McKinney's Cons. Laws of NY, Book 39, Penal Law § 15.00 at 44 (intent "may be proved by circumstantial evidence, and the objective evidence of the surrounding circumstances may be examined to determine a person's 'conscious objective"').

Adopting this reasonable limiting construction saves the statute from any constitutional infirmity under an overbreadth challenge. The proposed limiting construction significantly limits the statute's reach to exclude protected sexual expression over the Internet. Adult Internet users have nothing to fear if they accidentally send to a child an e-mail containing material proscribed by the statute to a child. And no liability will be imposed if an adult unwittingly engages in any of the proscribed conduct with a minor in a group chat room or in a one-on-one chat.

Defendant suggests that the statute reaches adults who wish to engage in sexual fantasies involving adults pretending to be children. Whether the statute would have a real effect on such speech is speculative. To the extent that it does have such a reach, it is hardly substantial in light of the State's legitimate and

compelling interest in protecting children from sexual exploitation. See New York v. Ferber, 458 U.S. at 757. Certainly, adults retain the right to pursue sexual fantasies, except when they intentionally take action that harms another, especially a minor. Under the limiting construction, only when adults, like defendant in this case, deliberately set their sights on a person they reasonably believe to be a minor and purposefully engage in Internet communications with that minor to induce that minor into performing a sexual act will they face liability under the statute.[5]

One factor that may serve to negate a defendant's intent would be evidence that a defendant made a reasonable effort to ascertain the child's true age and that the child interfered with the defendant's age determination. See Penal Law § 235.23(3)(a). Thus, defendant's intent in these circumstances would be a question of fact to be decided by the jury.

In this case, defendant intentionally transmitted the materials proscribed by the statute to a person that he believed to

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[5] Defendant also claim that Penal Law § 235.22 is overbroad because it creates a "heckler's veto" whereby a person in a group chat room could stifle sexual communications between adults merely by declaring that he or she is a minor, whether or not that is in fact true. See Reno v. ACLU, 521 U.S. 844, 880 (1997). While the so called "heckler's veto" was a grave concern under the paradigm set forth in Reno, where the Supreme Court found that portions of the Communications Decency Act of 1996 (CDA) were overbroad because they punished, in a vague and undefined way, "indecent" and "patently offensive" speech, it is of lesser or no concern under the precisely defined statute at issue in this case. Penal Law § 235.22's requirement that a defendant deliberately target a minor in order for liability to be imposed makes this statute substantially narrower than the one at issue in Reno.

be a minor.[6] Defendant admitted that he deliberately sent child pornography to a person who he believed to be only 15 years old. See People v. Foley, 257 A.D.2d at 248; R: 915-921. He also urged her to masturbate while she viewed it, and had discussions with the purported 15-year-old so that they could arrange a sexual rendezvous. See, People v. Foley, 257 A.D.2d at 248; R: 519, 521-23, 574, 578-79, 588, 592-93, 595, 618, 621, 626-30, 654-57, 661, 664-67. These actions more than satisfied the intent element.[7]

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[6] Such intent also was satisfied by the defendant in People v. Barrows, 177 Misc. 2d 712 (Sup. Ct. Kings Co. 1998), the only other reported case where a defendant was prosecuted under Penal Law § 235.22. The defendant in Barrows satisfied the intent element because he: (1) met the victim, an undercover detective portraying a 13-year-old girl in a "preteen chat room"; (2) demonstrated that he understood that the purported victim was only 13; (3) intentionally sent child pornography to the purported 13-year-old; (4) urged the purported victim to masturbate while viewing the child pornography; and even (5) intentionally drove to Brooklyn to effectuate a sexual rendezvous with the fictional 13 year old. See People v. Barrows, 177 Misc.2d at 714-22.

[7] If this Court adopts the proposed limiting construction, defendant's conviction under Penal Law § § 110.00/23 5.22 will not be jeopardized. Although defendant alleged in the Appellate Division that the jury charge failed to convey to the jury that defendant was required to act with intent to be held liable under the statute, the Appellate Division specifically held that defendant failed to preserve any challenge to the court's charge. See 257 A.D.2d at 253. Thus, even if this Court adopts the proposed limiting construction, the fact that the trial court may not have specifically included the intent standard in its jury charge does not affect the validity of defendant's conviction because defendant failed to preserve any claim regarding the inadequacy of that charge. See People v. Gray, 86 N.Y.2d 10, 18-19 (1995). In any event, there is overwhelming evidence in the record that defendant acted with the requisite intent.

Although defendant concedes that any purported overbreadth in the statute can be cured by a limiting construction, he contends that such a construction should require the People to prove both intent and that the defendant committed some sort of "overt act" towards actually meeting the child (Defendant's Reply Brief at 5). An "overt act" requirement is not supported by the plain language of the statute. Moreover, the additional "overt act" requirement that defendant suggests is unnecessary. Because intent is proven by examining the totality of a defendant's actions, a jury necessarily must consider whether a defendant committed "overt acts" such as those suggested by defendant (arranging transportation for a minor or entering the state to meet a minor, see Defendant's Brief at 40). Thus, it would be redundant for the People to be required to prove that a defendant intended to lure a minor into sexual activity and that the defendant also intended to commit an "overt act."[8]

Defendant also maintains that the statute is overbroad because the "harmful to minors" standard, which proscribes the transmission of materials that are obscene as to minors under prevailing New York standards (See Penal Law § 235.20[6]), will

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[8] Defendant mistakenly claims that the Barrows court sustained one of the charges of Attempted Disseminating Indecent Material to a Minor charges against the defendant on First Amendment grounds by reading an overt act requirement into the statute (Defendant's Brief at 42-43). Instead, the court found that the charge against the defendant relating to his travel from Connecticut to Brooklyn to meet the putative minor survived a Commerce Clause challenge. See People v. Barrows, 177 Misc. 2d at 733. Nonetheless, the court, relying principally on Reno v. ACLU, dismissed this charge on First Amendment grounds. Id. at 733-35. Thus, defendant's claim that Barrows read an overt act requirement into the statute to sustain a First Amendment challenge is meritless.

be unfairly imposed on Internet users in other states that may employ different community standards (Defendant's Reply Brief at 8). While communities may differ about what materials are obscene as to adults, there is much more consensus on what materials are obscene as to minors. And any potential community differences regarding this standard is reduced further where, as here, the type of materials that are to be construed under the "harmful to minors" standard include "actual or simulated nudity,[9] sexual conduct[10] or sado-masochistic abuse."[11] See Penal Law § 235.22(l).

In any event, New York has some of the most lenient standards regarding obscenity in the nation. See, e.g., People ex. rel. Arcara v. Cloud Books, Inc., 68 N.Y.2d 553, 557 (1986) ("New York has a long history and tradition of fostering freedom of expression, often tolerating and supporting works which in other states would be found offensive in the community."); United

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[9] "Nudity" is defined as "the showing of the human male or female genitals, pubic area or buttocks with less than a full opaque covering, or the showing of the female breast with less than a fully opaque covering of any portion thereof below the top to the nipple, or the depiction of covered male genitals in a discernibly turgid state. Penal Law § 235.20(2).

[10] "Sexual Conduct" is defined as "acts of masturbation, homosexuality, sexual intercourse, or physical contact with a person's clothes or unclothed genitals, pubic area, buttocks or, if such person be a female, breast." Penal Law § 235.20(3).

[11] Sado-masochistic abuse" is defined as "flagellation or torture by or upon a person clad in undergarments, a mask or bizarre costume, or the condition of being fettered, bound or otherwise physically restrained on the part of one so clothed." Penal Law § 235.20(5).

States v. Various Articles of Obscene Merchandise Schedule No. 2102, 709 F.2d 132, 134, 137 (2d Cir. 1983) (upholding district court's conclusion that "detailed portrayals of genitalia, sexual intercourse, fellatio and masturbation," including the film "Deep Throat" and other pornographic films and magazines, are not obscene in light of the community standards prevailing in New York City area). Thus, it is unlikely that any material considered to be "harmful to minors" in New York would not be considered "harmful to minors" outside New York.

3. The federal cases reviewing the constitutionality of statutes regulating Internet communications do not support defendant's overbreadth claim.

The federal cases reviewing the constitutionality of statutes regulating Internet communications do not support defendant's overbreadth claim because not one of them addresses the constitutionality of a statute that criminally punishes adults for both transmitting sexually explicit material to minors and then inviting or inducing those same minors to engage in sexual activity. See, e.g., Reno v. ACLU, 521 U.S. 844 (1997); ACLU v. Johnson, 194 F.3d 1149 (10th Cir. 1999); Cyberspace v. Engler, 55 F.Supp.2d 737 (E.D. Mich. 1999); ACLU v. Reno, 31 F.Supp.2d 473 (E.D. Pa. 1999); American Libraries Association (ALA) v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997). Instead, these cases declared unconstitutional Internet statutes that merely proscribed, in various formulations, the transmission or availability of sexual or other types of images or comments to minors that were either "harmful to minors" or otherwise "indecent" or "patently offensive." See, e.g., Reno v. ACLU, 521 U.S. at 859-60; ACLU v. Johnson, 194 F.3d at 1152.

Indeed, the federal court that declared portions of the New Mexico Internet statute unconstitutional specifically noted that its decisions in no way addressed the sections of the statute that prohibited a person from using the Internet to lure a minor into sexual activity. See, ACLU v. Johnson, 194 F.3d at 1152 n.1 (court struck down portion of New Mexico statute proscribing dissemination of Internet communications to minors that depicted "nudity, sexual intercourse or any other sexual conduct" on First Amendment and Commerce Clause grounds, but noted that the plaintiffs had not challenged the portion of the statute "criminalizing child luring by means of a computer").

In support of his claim that the challenged statute is substantially overbroad, defendant relies heavily on Reno, in which the Supreme Court declared portions of the CDA unconstitutional on overbreadth and vagueness grounds. See, Reno v. ACLU, 521 U.S. at 871, 873, 877-78, 881. The CDA is distinguishable, however, because it did not have a luring provision. Instead, it placed criminal liability only upon individuals who: (1) knowingly transmitted "obscene or indecent" comments or images over the Internet to any person under the age of 18 (see 47 U.S.C. § 223 [a]); or (2) used the Internet to send or display any comment or image that "in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs" to any person under the age of 18 (see 47 U.S.C. § 223 [d)]). Id. at 859-60.

The Court also held that the CDA was overbroad and vague because it did not provide Internet users with proper guidance about the type of materials that were criminally prohibited. Id. at 871. By contrast, the operative terms of Penal Law § 235.22 are precisely defined. The statute only covers Internet users who transmit sexually explicit communications to minors and then attempt to lure those minors into sexual activities.

See Penal Law § 235.22. Due to the statute's explicit wording and narrow scope, defendant's overbreadth claims here, unlike those under the CDA, are not premised upon any alleged interference with the transmission of materials having scientific, educational or other redeeming social value. Id. at 877, 881.[12] In short, the statute at issue here is considerably narrower than the CDA because it is concerned only with the real fear that a pedophile will use the Internet to entice a child into performing a sexual act.

In sum, defendant cannot meet his burden of showing real and substantial overbreadth in light of. (1) the state's legitimate interests in protecting its children from cyber-pedophiles; (2) the statute's dual-pronged requirements; (3) the ordinary defense for reasonable efforts to ascertain the age of the recipient of the communication; and (4) the statute's definitions that precisely describe the prohibited communications. Moreover, under the limiting construction advocated in the alternative by the Attorney General, it places liability only those individuals who intentionally transmit to minors explicit sexual communications to lure those minors into performing sexual acts. Under this construction, the statute will have at most a de minimis impact on an adult's ability

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[12] Likewise, the Reno Court's concern that liability could be imposed on an Internet user who merely displayed "indecent" material on his computer in the presence of a minor would not be realized in this case. Reno v. ACLU, 521 U.S. at 877. Aside from the fact that the statute here, unlike the CDA, carefully describes and defines the specific material that may not be transmitted to minors, liability cannot be imposed in this case unless the Internet user also attempts to lure a minor into sexual conduct. See Penal Law § 235.22(2). Thus, the type of substantial overbreadth present in Reno, which could have potentially placed criminal liability on a person who merely displayed material that violated the CDA's undefined "indecency" provision, is simply not present in this case.

to freely communicate about sexual matters over the Internet. For these reasons, defendant's overbreadth challenge must fail.

B. There is No Merit to Defendant's Claim that Penal Law § 235.22 is Unconstitutionally Vague

Defendant also claims that Penal Law § 235.22 is unconstitutionally vague because the "luring" portion of the statute uses the imprecise words "importunes, invites, or induces" and "for his benefit," which he contends are imprecise. These terms, however, have common and ordinary meanings and the context in which they are used provides sufficient notice to those reading the statute of the conduct that is prohibited.

This Court has adopted a two-pronged analysis to determine whether a statute is unconstitutionally vague. Under the first prong, a court must determine whether the statute provides "sufficient notice of what conduct is prohibited[.]" People v. Bright, 71 N.Y.2d at 382 (citations omitted); see also People v. Nelson, 69 N.Y.2d 302, 307 (1987). If a statute "'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices,'" it will survive a vagueness challenge even if it contains language that is "inherently imprecise." People v. Shack, 86 N.Y.2d 529, 538 (1995) (quoting United States v. Petrillo, 332 U.S. 1, 8 (1946)). Under the second prong of the vagueness test, a court must determine whether the statute is written in such a manner so "as to permit or encourage arbitrary and discriminatory enforcement." People v. Bright, 71 N.Y.2d at 382; see also People v. Shack, 86 N.Y.2d at 538. The Constitution, however, "only requires reasonable precision; it does not impose 'impossible standards.'" People v. Cruz, 48 N.Y.2d 419, 424 (1979) (quoting United States v. Petrillo, 332 U.S. at 7-8). Thus, a "'statute will not be struck

down as vague, even though marginal cases could be put where doubts might arise.'" Id. (quoting United States v. Harriss, 347 U.S. 612, 618 (1954)). Finally, when making a vagueness determination, the challenged portion of the statute "cannot be viewed in isolation" but, instead, must be considered within the context of the statute as a whole. People v. Shack, 86 N.Y.2d at 538-39.

1. The terms "importunes," "invites" or "induces" are not unconstitutionally vague.

Defendant maintains that the terms "importunes, invites or induces," as used by Penal Law § 235.22(2), are unconstitutionally vague. Although these terms are not defined by the Penal Law, each of these words has a common and ordinary meaning. The "quest for definiteness does not preclude the Legislature from using ordinary terms to express ideas that find adequate interpretation in everyday usage and understanding." People v. Illardo, 48 N.Y.2d 408, 414 (1979). Webster's Dictionary defines "importune" as "to press or urge with frequent or unreasonable requests or troublesome persistence," "induce" as "to move and lead (as by persuasion or influence)" and "invite" as "to offer an incentive or inducement ... [or] to request the presence or participation of." See Webster's Third New International Dictionary at 1135, 1154, 1190 (1981). Any person of "ordinary intelligence" would understand that these terms refer to a conscious effort to seduce, lure, solicit, or otherwise persuade. See People v. Nelson, 69 N.Y.2d at 307. The common meaning of these terms would not permit the statute to be enforced in an arbitrary or discriminatory manner.

Furthermore, taken in the context of the entire statute, the conduct that the Legislature prohibiting is evident. By its plain language, the statute forbids a person from doing two things:

(1) transmitting sexually explicit communications to a minor; and (2) through the transmission of such material, seducing, persuading or luring that minor to engage in specific sexual acts with him or for his gratification. See Penal Law § 235.22. All of the sexual acts specified in the second prong of the statute are precisely defined by the Penal Law,[13] leaving no doubt as to the forbidden behavior. Because this language as a whole "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices," defendant's vagueness challenge to the terms "importunes, invites or induces" must fail. People v. Shack, 89 N.Y.2d at 538; see also People v. Cruz, 48 N.Y.2d at 424.[14]

2. The term "for his benefit" is not unconstitutionally vague.

Defendant also claims that the term "for his benefit," as used in Penal Law § 235.22(2), is unconstitutionally vague. Penal Law § 235.22 (2) prohibits a defendant from using the computer communication proscribed by the first prong of the statute to "importune[], invite[] or induce[] a minor ... to engage in a sexual

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[13] The terms "sexual intercourse" and "deviate sexual intercourse" are defined in Penal Law § 130.00 (1), (2). The terms "sexual performance" and "obscene sexual performance" are defined in Penal Law § 263.00(l), (2). And the term "sexual contact" is defined in Penal Law § 130.00(3). These definitions, which defendant does not challenge, remove any uncertainty as to the conduct proscribed by the statute.

[14] Not one of the arguments defendant sets forth in his brief support his claim that terms "importunes," "invites" or "induces" are unconstitutionally vague (Defendant's Brief at 37-44). Instead, these arguments simply rehash his meritless overbreadth claim, which the Intervenor has already addressed.

performance, obscene sexual performance, or sexual conduct for his benefit."

The word "benefit" is defined in Penal Law § 10.00(17) as "any gain or advantage to the beneficiary and includes any gain or advantage to a third person pursuant to the desire or consent of the beneficiary." Thus, the statute prohibits a defendant from transmitting a sexually explicit communication to a minor and then inducing or inviting that minor to engage in a variety of sexual acts, including masturbation,[15] for the defendant's own "gain or advantage." A person of "ordinary intelligence" would understand that in a crime involving computer communications about sex, a pedophile can obtain "a gain or advantage" in the form of sexual gratification merely by persuading a minor to engage in a sexual act, even outside the defendant's presence.[16] In addition, there may be circumstances where a pedophile engages in this type of conduct to gain power over the child, which the pedophile can then use to his or her advantage in eventually arranging a meeting with the child. See Mark S. Kende, 77 Or. L. Rev. at 1162-63; Joseph N. Campolo, Childporn GIF: Establishing Liability for On-Line Service Providers, 6 Fordham. I.P., Media & Ent. L.J. 721 (1996) ("Pedophiles, after establishing a dialogue with minors in ... [Internet] 'chat' areas, often send these minors child pornography in order to begin a sexual dialogue with the intent of luring the

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[15] Penal Law § 235.20(3) defines "Sexual Conduct" as "acts of masturbation, homosexuality, sexual intercourse or physical contact with a person's clothed or unclothed genitals, pubic area, buttocks or, if such person be a female, breast."

[16] Indeed, the legislative history for the statute provides that even if "actual physical contact is not made between pedophile and victim, the minor is still being exploited." Exhibit A, Sponsors' Memorandum, Bill Jacket, L. 1996, ch. 600

minor from home. These tactics have become common and effective methods of victimizing minors within the cyber-pedophilic world."). Accordingly, the statute sufficiently notifies a person of "ordinary intelligence" of the conduct that is prohibited by the statute. See People v. Nelson, 9 N.Y.2d at 307; People v. Illardo, 48 N.Y.2d at 414.[17] For these reasons, defendant's vagueness challenge must fail.

C. Penal Law § 235.22 Complies with the First Amendment Because it does not Prohibit Protected Speech. But even if this Court finds that the Statute is a Content-Based Regulation, it passes Constitutional Muster under the Strict-Scrutiny Test.

By prohibiting a person from using sexually explicit material to lure a child into sexual activity, Penal Law § 235.22 does not punish speech aimed at any legitimate expression protected by the First Amendment. Rather, it criminalizes only speech intentionally used for the illegitimate and illegal purpose of luring a child into sexual activity that the statute proscribes. For this reason, the statute does not run afoul of the First Amendment.

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[17] Defendant, relying on People v. Barrows, 177 Misc.2d at 732-33, suggests that, in the absence of an "overt act" requirement, the term "for his benefit" is vague because there is no proof that a minor who has been encouraged by a pedophile to masturbate over the Internet has actually committed such an act (Defendant's Brief at 44-45). This is irrelevant because liability under the statute is premised upon a defendant's conduct in luring a child into performing a sexual act and not whether the minor actually performed the sexual act. See Penal Law § 235.22. Moreover, defendant's argument does not address the clarity of the statute, which informs defendants and law enforcement personnel about the type of conduct prohibited.

The First Amendment protects, above a else, speech that is part of the "exposition of ideas." Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). Public expression of ideas may not be prohibited merely because the ideas themselves are offensive to some of their hearers. See Street v. New York, 394 U.S. 576, 592 (1969). But speech that is "so removed from any 'exposition of ideas"' will "lack[] all protection." Virginia State Board of Pharmacy v. Virginia Citizens Consumer Counsel, 425 U.S. 748, 762 (1976) (quoting Chaplinsky v. New Hampshire, 315 U.S. at 572).

Speech used to harass, abuse, or harm a listener has little to do with the exchange of ideas that the First Amendment seeks to foster and protect, and therefore, criminal prohibitions on such speech pass constitutional muster. For example, true threats are not protected by the First Amendment. Watts v. United States, 394 U.S. 705, 707, 708 (1969); United States v. Kelner, 534 F.2d 1020, 1025-27 (2d Cir.), cert. denied, 429 U.S. 1022 (1976). And, similarly, "resorts to epithets or personal abuse" are not "a communication of information or opinion safeguarded by the Constitution." Cantwell v. Connecticut, 3 10 U.S. 2965 309-10 (1940). Indeed, telephone calls made with the intent to "harass, annoy, threaten or alarm another person" can be the subject of criminal proscription without running afoul of the First Amendment. See People v. Shack, 86 N.Y.2d at 535, 536 (rejecting First Amendment challenge to aggravated harassment statute). Accordingly, speech used as a vehicle to engage in criminal conduct is not protected by the First Amendment. See Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498 (1949) ("[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute"); United States v. Kufrovich, 997 F. Supp. 246, 254 (D. Conn.

1997) ("criminal conduct is not protected under the First Amendment simply because it involves the use of speech").

Speech used to foster the sexual exploitation of children also does not enjoy any constitutional protection. See Osborne v. Ohio, 495 U.S. at 109-10. For example, in United States v. Kufrovich, 997 F. Supp. at 254, the Federal District Court in Connecticut held that a defendant's conviction for using an Internet communication to knowingly persuade, induce, entice, or coerce a minor to engage in a sexual act in contravention of 18 U.S.C. §§ 2422(b)[18] did not violate the First Amendment because the proscribed speech was "the 'very vehicle of the crime itself" (citation omitted). Likewise, in United States v. Powell, 1 F.Supp.2d 1419, 1422 (N.D. Ala. 1998), aff'd without op. 177 F.3d 982 (11th Cir. 1999), the court noted that 18 U.S.C. § 2422(b) did not run afoul of the First Amendment because it criminalized "the use of interstate commerce for the purpose of

[18] 18 U.S.C. § 2422(b) provides in pertinent part: "[w]hoever, using the mail or any facility or means of interstate or foreign commerce ... knowingly persuades, induces, entices, or coerces any individual who has not attained the age of 18 years, to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense, or attempts to do so shall be fined under this title, imprisoned not more than 15 years, or both."

persuading, inducing, and enticing a person under eighteen years of age to engage in a sexual act which is already illegal.[19]

This concept also has been applied in a somewhat different context by New York courts, which have permitted adults to be held criminally responsible for making sexual communications to a child. For example, if an adult meets a minor on a street comer and hands the minor sexually explicit materials or tries to induce a minor to engage in sexual activity, the adult, at the very least, can be charged with Endangering the Welfare of a Child under Penal Law § 260.10. See People v. Rice, 17 N.Y.2d 881 (1966) (using obscenities to ask two girls aged 12 and 13 to perform an "immoral act" supported endangering conviction); People v. Dunavin, 173 A.D.2d 1032, 1034 (3d Dep't. 1991) (defendant properly convicted of endangering for showing two girls aged 7 and 10 a sexually explicit film and pinching their buttocks); People v. Ahlers, 98 A.D.2d 821, 822-23 (3d Dep't. 1983) (defendant

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[19] The Supreme Court has also ruled that the First Amendment will not protect speech use as a vehicle to harm children. For example, in New York v. Ferber, 458 U.S. at 761-64, the Court rejected a First Amendment challenge to a New York statute (Penal Law § 263.15) that outlawed promotion of a sexual performance by a child under the age of sixteen. The Court held that the speech at issue in Ferber -- a person's right to promote, distribute, or advertise child pornography -- was not protected by the First Amendment because such speech was "intrinsically related to the sexual abuse of children." Id. at 759. The circulation of child pornography was related to the sexual abuse of children because it "exacerbated" the harm already suffered by the children who were first victimized when these materials were originally produced. Id. Thus, the Court upheld the statute on First Amendment grounds because the State's compelling interest in protecting children from the evils of child pornography overwhelmingly" outweighed any "expressive interest[]" a person had in distributing or promoting child pornography. Id. at 763-64.

properly convicted of endangering because he encouraged a child to engage in sodomy); People v. Poplaski, 162 Misc. 2d 209 (Dist. Ct. Nassau Cty 1994) (defendant who spoke to boys between the ages of 12 to 15 over the telephone that he constitutionally guaranteed"). These cases demonstrate that while an adult unquestionably has the right to engage in sexually oriented speech, he or she does not have an unbridled right to communicate such speech to children.

The import of these decisions is that speech used to harm the listener is not immunized by the First Amendment. The communications proscribed by Penal Law § 235.22 are criminalized because they are used to induce children into performing a variety of illegal sexual acts. Communications of this type are wholly unrelated to the exchange of ideas that the First Amendment seeks to foster and protect and antithetical to the State's compelling interest in "'safeguarding the physical and psychological well-being of a minor.'" New York v. Ferber, 458 U.S. at 756 (citation omitted). For these reasons, Penal Law § 235.22 is consistent with the free speech provisions of the state and federal constitutions. See New York v. Ferber, 458 U.S. at 761-64; Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 498; United States v. Kufrovich, 997 F. Supp. at 254.

In any event, even if the Court finds that Penal Law § 235.22 is a content-based statute, it passes constitutional muster under the strict-scrutiny test that applies to such statutes. A content-based limitation on speech will be upheld if the state demonstrates that the limitation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end." Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). In this case, the state, undeniably, has an overwhelming interest in the "prevention of sexual exploitation and abuse of children." New York v. Ferber, 458 U.S. at 757 (describing this

interest as one of "surpassing importance"); see also Sable Communications of California, Inc. v. FCC, 492 U.S. 115, 126 (1989) (state has a "compelling interest in protecting the physical and psychological well-being of minors").

Moreover, Penal Law § 235.22 is necessary to further the state's compelling interest in protecting its children from pedophiles because the harms that it seeks to, eradicate "are real, not merely conjectural, and. the [statute] will in fact alleviate these harms in a direct and material way." Turner Broadcasting Systems, Inc. v. FCC, 512 U.S. 622, 664 (1994). The statute was enacted because the Legislature recognized that pedophiles were using the Internet to harm minors by luring them into sexual activity. Through this new medium, as demonstrated here, in Barrows, and in cases throughout the country,[20] pedophiles have been attempting to lure children into sexual activity through the transmission of child pornography and other sexually explicit materials. The statute alleviates these harms in a "direct and material way" by deterring pedophiles from using the Internet to engage in this conduct and by punishing them for attempting to lure a child into performing a sexual act.

Not only is Penal Law § 235.22 necessary to further the State's compelling interest in protecting children from pedophiles, but it is narrowly tailored to effectuate that interest because it does not "unnecessarily interfer[e] with First Amendment freedoms." Sable Communications v. FCC, 492 U.S. at 126. Because both prongs of Penal Law § 235.22 must be satisfied, no protected

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[20] See Amanda Garrett, Undercover Deputy Foils Chat Room Sex Scheme, Cleveland Plain Dealer, November 2, 1999 at A1 (recounting numerous cases where cyber-pedophiles have attempted to lure police officers, posing as children, into sexual encounters, and noting that since 1995, the F.B.I. has investigated 3,000 "cases involving sexual exploitation of children on the Internet").

sexual expression comes within the ambit of the statute unless the defendant uses the communications proscribed by statute as a vehicle to lure a child into sexual activity. Cf. Reno v. ACLU, 521 U.S. at 877. And because a state may lawfully regulate sexually explicit materials that are "harmful to minors" (see, Ginsberg v. New York, 390 U.S. 629, 633 (1968)), prohibiting the transmission of such materials in the limited circumstance when a person seeks to use those communications to lure a child into sexual activity does not "unnecessarily interfer[e] with First Amendment freedoms." Sable Communications v. FCC, 492 U.S. at 126.

POINT TWO

PENAL LAW § 235.22 DOES NOT VIOLATE THE COMMERCE CLAUSE EITHER FACIALLY OR AS APPLIED BECAUSE IT SERVES A COMPELLING STATE INTEREST WITHOUT UNDULY BURDENING INTERSTATE COMMERCE

Penal Law § 235.22 protects New York's recognized compelling interest in safeguarding the welfare of its children. Regulation of this type of criminal conduct is traditionally reserved to the States. See Brecht v. Abrahamson, 507 U.S. 619, 635 (1993) ("Under our federal system, the 'States possess primary authority for defining and enforcing the criminal law"') (citations omitted)). The Commerce Clause does not prevent the State from prosecuting individuals when they attempt to sexually exploit children in New York via the Internet.

The Commerce Clause delegates to the federal government the power "[t]o regulate Commerce ... among the several States." U.S. Constitution, Art. I, § 8, cl. 3. Although the dormant Commerce Clause may forbid states from passing or enforcing

laws that discriminate against or unduly burden interstate trade, Associated Industries of Missouri v. Lohman, 511 U.S. 641, 646-47 (1994); Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. 662, 669 (1981), the States nonetheless "retain authority under their general police power to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." Lewis v. BT Investment Mgrs, Inc., 447 U.S. 27, 36 (1980).

In this case, defendant can raise no valid Commerce Clause challenge because the criminal activity regulated by Penal Law § 235.22 is a valid exercise of the State's police powers. Moreover, defendant's actions that subjected him to criminal prosecution were wholly intrastate, and had no impact at all on any interstate commerce. Finally, even if some prosecutions under this statute might have a minimal connection to interstate commerce, any such burden is outweighed by New York's substantial interest in protecting its children from pedophiles.

A. Penal Law § 235.22 is a Valid Exercise of the State's Police Powers

Penal Law § 235.22 is a criminal statute that by its terms has nothing to do with commerce. Criminal conduct is an area over which the States have primary authority. See Brecht v. Abrahamson, 507 U.S. at 635. It would constitute a serious departure from established precedent to deem criminal activity, especially directed toward children, a form of "commerce" protected by the Constitution. United States v. Lopez, 514 U.S. 549, 567 (1995) (distinguishing "congressional authority under the Commerce Clause" from a "general police power of the sort retained by the States"); General Motors Corp. v. Tracy, 519 U.S. 278, 299 (1997) (fundamental objective of the dormant Commerce

Clause is to "preserve a national market for competition"). As the Appellate Division correctly held in this case:

> [t]he purpose of Penal Law § 235.22 was not to regulate commerce, but to protect the children of this State who use the Internet. The statute is not an economic protectionist measure, but rather is directed at a legitimate local concern .... [W]e cannot conceive of any legitimate commerce involving the sending of graphic images to minors while at the same time attempting to lure them into engaging in sexual activity. People v. Foley, 257 A.D.2d 243, 253 (4th Dept. 1999).

There is no valid reason that the state's traditional criminal authority cannot be extended to the Internet, even though the Internet may have some commercial uses. After all, states man prosecute individuals who commit crimes that occur on the interstate highways, see People v. Cooper, 90 N.Y.2d 292 (1997) (driving while intoxicated); People v. Cooper, 78 N.Y.2d 476 (1991) (vehicular manslaughter); People v. Kibbe, 35 N.Y.2d 407 (1974) (robbery and murder on highway), or through the use of a telephone. See People v. Bell, 73 N.Y.2d 153 (1989) (bribery through use of telephone); People v. Shack, 86 N.Y.2d 529 (1995) (aggravated harassment via telephone). See also People v. Broady, 5 N.Y.2d 500, 509-10 (1959) (New York statute that proscribed wiretapping withstood a dormant Commerce Clause challenge because the statute was not "an attempted regulation of telephonic communications, but simply was a 'local police measure' designed to protect the People of this State against unwarranted intrusions into their privacy"). The Internet is not significantly different from these other instrumentalities of commerce -- the highways or the telephones -- so as to remove it entirely from state criminal

regulation when it is used to effectuate a crime, especially a crime against children.

Moreover, even though the Internet may, in some circumstances, be used as an instrumentality of commerce, Penal Law § 235.22 has little or no connection to any type of commercial activities within the traditional sweep of the Commerce Clause. As discussed in Point One, supra, this statute specifically targets only. those individuals who use the Internet to transmit sexually explicit materials in an effort to lure children into illegal sexual activity. Not only is this an area in which New York has a special local interest, Globe Newspaper Co., 457 U.S. at 607, but it also is an area that deserves no "economic" protection. Cf. New York v. Ferber, 458 U.S. 747, 757-63 (1982) (states may bar distribution of child pornography even when produced in other states); see also Davis-Kidd Booksellers, Inc. v. McWherter, 866 S.W.2d 520 (Tenn. 1993) (state law against display of obscenity to children did not violate the Commerce Clause). And although the Commerce Clause bars economic protectionist regulation, it is not economic "protectionism" for states to ban "traffic in noxious articles, whatever their origin." Philadelphia v. New Jersey, 437 U.S. 617, 629 (1978).

Nor is there any reason for this Court to find that Penal Law § 235.22 is unconstitutional merely because the district court, in American Libraries Association v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997), invalidated on Commerce Clause grounds a related statute, Penal Law § 235.21(3), which made it a crime to send a sexually explicit depiction to a minor over the Internet. The decision of this lower federal court is not binding on this Court. See People v. Kin Kan, 78 N.Y.2d 54, 60 (1991). Moreover, the ALA court itself recognized that 235.22 differs materially from the statute invalidated in that decision. Penal Law § 235.21(3) prohibited the online transmission of sexually explicit materials to

minors. By contrast, 235.22 requires that the State prove the elements of the ALA statute and also prove that the defendant tried to lure a minor into engaging in sexual activity with him or for his benefit. This additional requirement effectively removes legitimate communications from the statute's reach -- a concern that troubled the ALA court, see 969 F. Supp. at 179-81 -- by focusing on the actual sexual exploitation of children. Indeed, ALA expressly distinguished 235.22 from the statute it invalidated on precisely this basis:

> Moreover, plaintiffs do not challenge the sections of the statute that criminalize the sale of obscene materials to children, over the Internet or otherwise, and prohibit adults from luring children into sexual contact by communicating with them via the Internet. See N.Y. Penal Law § 235.21(l); N.Y. Penal Law § 235.22(2). The local benefit to be derived from the challenged section of the statute is therefore confined to that narrow class of cases that does not fit within the parameters of any other law.

ALA v. Pataki, 969 F.Supp. at 179 (emphasis added). Given that the ALA court itself recognized that its holding did not reach the statute at issue here, the case supports the State's position, rather than petitioner's.

Given the State's traditional criminal authority, this Court should find that Penal Law § 235.22's regulation of criminal activity on the Internet is not prohibited under the Commerce Clause. Indeed, any decision to the contrary is anathema to the Supreme Court's warning against "pil[ing] inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of

the sort retained by the states" (Lopez, 514 U.S. at 567), and is contrary to this State's recognized power to protect its children from sexual abuse.

B. A Commerce Clause Challenge is Inappropriate in this Case, which Involved Purely Intrastate Communications

Not only does Penal Law § 235.22 constitute a legitimate exercise of the State's police powers, but a Commerce Clause challenge is inappropriate here because the relevant conduct is wholly intrastate. Even if there might be some circumstances in which Penal Law § 235.22 might have a minimal impact on interstate activity (see subpoint C, infra), that is not the case here. Defendant was convicted for criminal conduct that occurred wholly within the State of New York. Thus, even if every Internet communication between persons in different states were deemed inviolate from state regulation, defendant could not be heard to complain that his rights or the federal government's authority to regulate were infringed by New York.

A party generally cannot challenge the constitutionality of a statute unless he is aggrieved by its particular application to him. As the Supreme Court stated in Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973), "embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before

the Court." See also Electrolert Corporation v. Bury, 737 F.2d 110, 144 (D.C. Cir. 1984).[21]

This Court has refused to review a Commerce Clause challenge when a purely domestic entity attempts to claim injury on behalf of out-of-state parties. For instance, in O'Kane v. State of New York, 283 N.Y. 439, 449 (1940), the Court declined to address a Commerce Clause challenge, stating:

The constitutionality of the statute, as applied to those in a class other than that in which appellants find themselves, does not aggrieve appellants .... This court may declare statutes unconstitutional only in so far as it is essential to do so in order properly to determine the relative rights of the litigants. See also Matter of Guardian Life Ins. Co. v. Chapman, 302 N.Y. 226, 238 (1951) (domestic insurer cannot raise Commerce Clause challenge applicable only to foreign insurance companies).

Both defendant and the victim in this case were at all times located within New York. Defendant, a New York resident, initiated and engaged in various communications inducing a person he believed was a fifteen-year-old girl to meet in Buffalo, New York, for sex. People v. Foley, 257 A.D.2d at 247-48. Defendant was caught in his New York residence using his computer for this

[21] An exception to this general rule is that a party may bring a First Amendment overbreath challenge on behalf of others whose legitimate speech may be "chilled" by a broadly worded statute. Broadrick, 413 U.S. 613-15.

purpose. Id. Application of the dormant Commerce Clause to this purely intrastate activity is thus unnecessary and inappropriate.[22]

Nonetheless, defendant seeks to raise a Commerce Clause challenge that is predicated, in part, on the claim that Penal Law § 235.22 has an extraterritorial impact. In support of this claim, he posits situations such as an out-of-state commercial web-site operator (Defendant's Brief at 34), a Los Angeles resident frequenting an Internet "hot chat" room, and an adult dating service outside New York (Defendant's Reply Brief at 11-14). But defendant's hypotheticals are irrelevant to any determination of whether his conduct implicated interstate commerce: his "injury" arose solely from his own violation of the New York Penal Law within the territorial confines of New York State.[23]

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[22] Indeed, in People v. Barrows, 77 Misc.2d 712 (Kings Co. 1998, upon which defendant relies, the court recognized that the constraints of the Commerce Clause did not apply when the defendant, by coming from Connecticut to a purported meeting with his victim in Brooklyn, evinced his intent to commit a crime within New York. In this case, defendant's nexus to New York is even stronger: both he and his victim remained in New York at all times.

[23] This case does not fall within an exception to the traditional standing requirement that was recognized in General Motors Corp. v. Tracy, 519 U.S. 278, supra. In that case, in-state customers paying more for natural gas because of a state tax imposed on foreign producers were deemed injured by the Commerce Clause violation. Here, by contrast, defendant suffered no such derivative injury by any application of Penal Law § 235.22 to the type of out-of-state computer users he posits in his hypotheticals.

Because defendant himself acted exclusively within the State, and he cannot assert any alleged Commerce Clause violation on behalf of others located out of state, the only possible "interstate" element of this case consists of the metaphysical possibility that, at some undetermined point, the electronic communications between defendant and the victim might have been directed through another State, even though both parties were located in New York at all relevant times. See ALA v. Pataki, 969 F.Supp. at 171. This tenuous and speculative connection to interstate commerce is insufficient to support a Commerce Clause challenge. There is no evidence that such "routing" actually occurred in this case, and this Court should not speculate that it did. As the Court recently recognized in Lunney v. Prodigy Services Company, ___ N.Y.2d ___, 1999 N.Y. Lexis 3746 at *14 (December 2, 1999), courts should be especially wary, particularly in cases dealing with emerging and rapidly changing technologies like the Internet, to decide issues that are not supported by a sufficient record. The Court stated:

> While many decisions serve to establish rules that advance predictability, courts cannot go beyond the issues necessary to decide the case at hand. An ambition of that sort would entail something very much like drafting advisory opinions. Misdirected or misapplied, they can create the very kind of uncertainty, or confusion, that purposeful decisional law seeks to eliminate. These general observations apply even more compellingly when dealing with Internet law. Given the extraordinarily rapid growth of this technology and its developments, it is plainly unwise to lurch prematurely into emerging issues, given a record that does not at all lend itself to their determination.

Moreover, the mere fact that a series of electronic messages exchanged between individuals within the same state might have crossed state lines at some point is not a sound basis to find an interstate connection sufficient to support a Commerce Clause challenge. In United States v. Paredes, 950 F. Supp. 584, 590 (S.D.N.Y. 1996), aff'd, 162 F.3d 1149 (2d Cir. 1998), the court found no interstate commerce at all to support jurisdiction over a murder-for-hire indictment involving the local use of an interstate paging system. The court observed: "That the paging system had the capacity to find the beeper owner in another state is not determinative; what matters is the actual location of the parties at the time the paging system was used." Id. The Paredes court noted that because communication is rapidly moving to media such as beepers, cellular phones, and e-mail, even between people located across the street from each other, asserting federal jurisdiction whenever such instrumentalities are used would seriously undermine the traditional police powers of the states. Id. at 589-90. Accordingly, in evaluating the assertion of federal jurisdiction, the court held that the focus "should be on the location of the communicating parties." 950 F.Supp. at 589 n.8.[24]

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[24] Interestingly, the two sections of the CDA that were struck down in Reno v. ACLU, 521 U.S. 844, 859 (1997), were both limited to persons displaying or transmitting indecent or patently offensive materials "in interstate or foreign communications." If Congress were to include a similar limitation in enacting a statute similar to Penal Law § 235.22, someone charged under the federal statute could argue, under Paredes, that the mere possibility that their communication with someone within the same state may have passed outside the state was an insufficient connection to interstate commerce to support federal jurisdiction. Any holding prohibiting a state from prosecuting a defendant in a case like this, in which both defendant and his victim were at all times located within the state, might then have the unintended result of completely shielding this type of Internet communication from any type of regulation.

Similarly, here, this Court should be reluctant to find an interstate aspect to this case involving a New York defendant and a New York victim, neither of whom ever traveled outside the state. The facts here simply do not call for a wholesale determination of the validity of Penal Law § 235.22 under the Commerce Clause because, regardless of whether the law may have some extraterritorial applications in theory, the conduct was a local matter. The Court need not and should not reach for hypothetical issues to decide this case.

C. Even if Penal Law § 235.22 Implicates the Commerce Clause, it does not Unduly Burden Interstate Commerce and is Therefore Valid

Even though this Court need not reach the Commerce Clause issue in this case, if it were to do so it should find that any incidental burden that Penal Law § 235.22 might impose on interstate commerce does not raise constitutional concerns. Indeed, the purported burdens alleged by defendant are entirely speculative, and to the extent that defendant is alleging that the statute will chill activity outside the State, these concerns are more appropriately addressed in a First Amendment overbreadth analysis.

As defendant acknowledges (see Defendant's Brief at 30-31), this statute does not discriminate against out-of-state entities on its face. It therefore must be upheld unless it unduly burdens interstate commerce:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on

> such commerce is clearly excessive in relation to the putative local benefits.

Philadelphia v. New Jersey, 43 7 U. S. at 624 (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)). Because any effect section 235.22 might have on interstate commerce is purely incidental and far outweighed by New York's compelling interest in protecting its children from sexual predators, defendant cannot meet this standard. Accordingly, this Court should decline petitioner's invitation to set aside the statute on Commerce Clause grounds.

1. The minimal burden on interstate commerce, if any, does not outweigh Penal Law § 235.22's substantial local benefits.

As discussed above, section 235.22 indisputably confers substantial benefits on the residents of New York State by protecting children from new dangers made possible by technological advances. In these circumstances, the dormant Commerce Clause imposes only a mild check on the State's authority to enact facially neutral legislation. "A State's power to regulate commerce is never greater than in matters traditionally of local concern." Kassel v. Consolidated Freightways Corp. of Delaware, 450 U.S. at 670. Because section 235.22's purpose is protecting the physical safety of the children of New York State -- a quintessentially local concern of paramount importance -- only an extraordinarily burdensome commerce would render this statute invalid.

Far from imposing a substantial burden on interstate commerce, however, any impact that the statute might have is minimal. Defendant's effort to show a substantial burden rests on

the assumption that out-of-state persons who engage in online sexually explicit communications with other out-of-state individuals will have their activities chilled by New York's statute. Yet defendant has not identified a single instance where New York prosecuted under similar circumstances, or offered a scintilla of proof that any out-of-state person has experienced such a chilling effect. Cf. ALA v. Pataki, 969 F. Supp. at 174-75 (citing to record evidence regarding alleged chilling effect of statute). Instead, defendant presents several speculative scenarios, and asks the Court to overturn section 235.22 on this basis. Even if the Court has concerns about whether the statute might in fact affect activities that occur wholly outside New York -- a conclusion that the State believes would be erroneous -- it should not render judgment on this question absent any factual evidence as to its accuracy. See, Lunney, 1999 N.Y. Lexis 3746 at *14.

Moreover, even if defendant's speculations are taken into account, they fall far short of establishing an excessive burden on interstate commerce sufficient to invalidate the statute. Defendant focuses on the hypothetical impact that section 235.22 might have on out-of-state persons who risk prosecution by "inadvertently" using the Internet to transmit sexually graphic material to minors in New York. As discussed in Point One, supra, this argument simply ignores the plain language of the "luring" prong of the provision, which protects from prosecution a person who merely transmits material without issuing such an invitation. And the defense provided by Penal Law § 235.22(3)(a) further limits any burden upon interstate commerce by immunizing an individual from liability if he makes "a reasonable effort to ascertain the true age of the minor." Thus, a participant in a chat room can engage in sexually charged communications and transmissions without fear simply by inquiring whether any minors are participating. Similarly, the creator of a website may insulate himself from liability simply by creating a screen that asks whether the person

accessing the site is under age -- a practice utilized nearly universally by adult-oriented web sites. Defendant's hypothetical worst-case scenarios are just that, hypothetical situations, and should not serve as a grounds for overturning this statute.[25]

Nor are the cases relied upon by defendant persuasive. As explained above, ALA explicitly distinguishes the statute challenged by defendant from the provision invalidated there, and even suggests that this statute in particular does not implicate any Commerce Clause concerns. Nor is People v. Barrows, 177 Misc.2d 712, supra, helpful to defendant. There, a lower court made a conclusory determination that "[t]o the extent that [online sexually explicit] communications involve interstate transmissions, Penal Law 235.22 also violates the Commerce Clause.[26] Id. at 733. In the absence of any further analysis or explanation, this statement can offer little assistance in resolving petitioner's

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[25] As the Supreme Court held in Philadelphia v. New Jersey, 437 U.S. at 624-25, "incidental burdens on interstate commerce may be unavoidable when a State legislates to safeguard the health and safety of its people." See also Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 471 (1981) (state permitted to ban sale of milk in non-returnable, non-refillable plastic containers despite some "negative" impact on interstate commerce). For similar reasons, any incidental burden which 235.22 might impose on interstate commerce is constitutionally permissible because the statute is necessary to safeguard the health and safety of New York's children.

[26] Another court in the same county had earlier reached a result directly contrary to the one relied upon by petitioner. In People v. Barrows, 174 Misc.2d 367, 372 (Kings Cty 1997), that court held that "the State of New York should have the power to punish anyone who sends sexually explicit material over the Internet to a minor in New York and then seeks to lure that child to perform a sexual act within the State."

Commerce Clause challenge. Moreover, even the Barrows court itself acknowledged that the Commerce Clause is an awkward vehicle for pressing petitioner's complaint that the statute unreasonably hampers online communications. Id. at 732-33 (challenge to a statute regulating online communications is best understood through the lens of the First Amendment, not the Commerce Clause).

2. Penal Law § 235.22 does not regulate conduct occurring wholly outside New York.

Defendant also contends that Section 235.22 offends the Commerce Clause because it regulates conduct occurring wholly outside New York State (Defendant's Brief at 32, 35). Even if the statute did affect activities that occur wholly outside New York -- which, as explained below, it does not -- such an impact would not come close to the intrusiveness of legislation invalidated on this basis. Statutes that have been set aside because they have "the practical effect of regulating commerce occurring wholly outside that State's borders," Healy v. Beer Institute, Inc., 491 U.S. 324, 333 (1989), are "price affirmation statutes." Id. at 331. For example, in Brown-Forman Distillers Corp. v. New York State Liquor Authority, 476 U.S. 573, 573 (1986), a case relied upon by defendant, the Court invalidated a state law requiring liquor importers to affirm that prices offered to local wholesalers were the lowest prices nationwide. Because New York, unlike other states, did not allow liquor prices to be reduced by rebates offered in other states, the New York law had the effect of prohibiting rebates in other states. The Court concluded that this practice violated the Commerce Clause, holding that a state "may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess." Id. at 580. See also Healy v. Beer Institute, Inc., 491 U.S. 324, supra (state law

requiring importers to guarantee that their prices did not exceed those demanded in all other states held invalid); Edgar v. MITE Corp., 457 U.S. 624 (1982) (invalidating state law that blocked corporate takeovers of multistate companies); Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 528 (1935) (Commerce Clause does not permit a state "to establish a wage scale or a scale of prices for use in other states, and to bar the sale of the products ... unless the scale has been observed") (Cardozo, J.). Unlike these cases, the State law at issue here only regulates activity directly involving a State resident, and has no effect whatsoever on pricing practices for commercial activities in any other state.

Moreover, the likelihood that Penal Law § 235.22 would in fact affect activities that occur wholly outside New York is remote at best. Basic principles of criminal jurisdiction circumscribe the statute's applicability to cases where either the sender or the recipient of the transmission were located in New York when the transmission occurred. See, People v. Stokes, 88 N.Y.2d 618, 624 (1996); C.P.L. §§ 20.20, 60.60(3). Prosecution clearly is not permitted regarding Internet communications between individuals outside the State.

Defendant suggests that out-of-state residents who send sexually explicit materials to children and attempt to lure them into sexual activity might be subject to prosecution under the statute because they cannot know that child's location with certainty. Even if out-of-state persons did in fact have such a fear, there is no indication this concern is well-founded. In the only two reported cases brought under section 235.22, defendants were on clear

notice that they were seeking to lure a child located in New York into sexual activity.[27]

3. Penal Law § 235.22 does not interfere with an area of commerce requiring a uniform federal regulatory scheme.

Contrary to defendant's claim, section 235.22 does not interfere with an area of commerce that requires a uniform federal regulatory scheme. While there may be instances where the principles underlying the Commerce Clause necessitate uniform treatment of online activities, this statute does not raise such concerns. Any "regulatory" effect that might result from application of 235.22 stands in stark contrast to the constitutional problems that arise when conflicting state laws subject a multi-state business to a "crazy quilt" of regulations. Courts have invalidated state statutes which make the transport of commercial goods across state lines prohibitively inefficient and costly. See, e.g., Southern Pacific Co. v. Arizona ex rel. Sullivan, 325 U.S. 761 (1945)

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[27] Moreover, defendant's scenarios ignore the fact that New York requires more than the mere posting of an Internet communication available to all Internet users in order to confer jurisdiction. See Bensusan Restaurant Corp. v. King, 937 F.Supp. 295 (S.D.N.Y.), aff'd, 126 F.3d 25 (1997) (Internet web page accessible in New York not sufficient by itself to establish civil long-arm jurisdiction here); People v. World Interactive Gaming Corporation, ___ Misc.2d ___, 1999 N.Y. Misc. LEXIS 425 (N.Y. Cty July 22,1999) (foreign corporation using offices in New York to actively entice gambling by New York residents on its website casino subject to State's gambling prohibitions). If, on the other hand, the individual's desire is to obtain a graphic depiction of a sexual performance by a minor, then his ultimate purpose would be illegal inmost jurisdictions. See Ferber, 458 U.S. 747, supra; Osborne, 495 U.S. 103, supra. No "invasion" of legal rights could be claimed.

(prohibiting states from regulating length of trains used in interstate commerce). These cases are inapposite, however. While it is possible that a statute could be crafted that would similarly hinder online commercial activities -- for example, if a state law mandated the use of particular programming protocols in any Internet transmission that traveled through that state, or required the use of a specific type of wire for transmitting online communications through the state -- such problems are self-evidently not implicated here. Instead, and as noted earlier, this statute merely criminalizes the attempted sexual abuse of children that is facilitated by the Internet.

Moreover, defendant has not identified any conflicting regulations in other states that legalize the type of conduct enjoined by Penal Law § 235.22. Cf, Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 448 (1960) (no impermissible burden on interstate commerce shown where "appellant argues that other local governments might impose differing requirements [but] pointed to none."). It is unlikely that many other states would permit adults to seduce children by transmitting sexually graphic material to them via the Internet. Nor has defendant suggested that there is preemptive federal legislation in this area. "In the absence of conflicting federal legislation, the States retain authority under their general police power to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected". Lewis v. BT Investment Mgrs. Inc., 447 U.S. at 36; Brotherhood of Locomotive Firemen v. Chicago R.I. & P.R. Co., 393 U.S. 129, 144 (1968) (upholding state railroad safety regulation not in conflict with federal law).

4. Defendant's position would prevent states from prosecuting many unlawful online activities.

Defendant's Commerce Clause claim is particularly troubling because of its implications for effective online law enforcement. Unable to identify any concrete burden that Penal Law 235.22 imposes on interstate commerce, defendant instead suggests that any state efforts to address online criminal activity are constitutionally suspect. That approach would dramatically eviscerate the States' police powers at a time when tremendous amounts of business, entertainment, and communication are moving online. Penal Law § 235.22, like any state statute that regulates intrastate acts, serves as a necessary counterpart to federal legislation that regulates interstate activity. If the Court were to conclude that all Internet communications are immune from exercise of the States' police powers simply because they can be transmitted without knowing the location of the recipient, the Internet would become a haven for unlawful activity.[28] Indeed, federal legislation that attempted to reach wholly intrastate acts

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[28] Under this rationale, the State would also arguably lack authority to prosecute individuals who make repetitive harassing telephone calls, since the telephone is an interstate instrumentality. Cf. People v. Shack, 86 N.Y.2d at 535 (upholding validity of New York's telephone harassment statute, Penal Law § 240.30(2)). The State might also be precluded from ticketing a trucker for speeding, driving while intoxicated, or carrying unsafe materials, because both his vehicle and the road "routinely" cross State lines. Cf. National Tank Truck Carriers, Inc. v. City of New York, 677 F.2d 270 (2d Cir. 1982). Nor could a state enforce its smoke abatement laws against ships docked in its ports. Cf. Huron Portland Cement Co. v. City of Detroit, 362 U.S. at 448 (affirming state's authority to pass regulation "of general application, designed to better the health and welfare of the community").

might itself be constitutionally suspect. See, e.g., United States v. Lopez, 514 U.S. at 567. As one state court held,

> There is no compelling reason to find that local legal officials must take a "hands off' approach just because a crook or con artist is technologically sophisticated enough to sell on the Internet. Invocation of "the Internet" is not the equivalent to a cry of "sanctuary" upon a criminal's entry into a medieval church.

People v. Lipsitz, 174 Misc.2d 571, 581 (N.Y. Cty. 1997) (local consumer protection laws held applicable to use of Internet to perpetuate fraudulent magazine subscription scheme).

The principles underlying the Commerce Clause in no way demand such a result. The Commerce Clause safeguards against the inappropriate use of "economic protectionism" by one state against another. While a state legislature might someday enact a law regulating online activities that might implicate these concerns, it is not the case that every statute addressing online conduct is intended to, or has the effect of, advantaging local businesses or residents over their out-of-state counterparts. To the extent that a concern about the potential "chilling" effect of a statute regulating Internet communications remains, that issue is best addressed under the rubric of the First Amendment. See Point One, supra. It should not, however, be confused with the type of economic burden at issue in a Commerce Clause challenge.

POINT THREE

THERE IS NO MERIT TO DEFENDANT'S CLAIM THAT PENAL LAW § 263.15 IS OVERBROAD BECAUSE IT FAILS TO SPECIFY THAT IT APPLIES ONLY TO ACTUAL AS OPPOSED TO FICTIONAL CHILDREN

Penal Law § 263.15 (Promoting a Sexual Performance by a Child) provides that a "person is guilty of promoting a sexual performance by a child when, knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a child less than sixteen years of age." The Supreme Court has specifically held that this statute is not overbroad and passes constitutional muster under the First Amendment. See New York v. Ferber, 458 U.S. at 773. Likewise, this Court has found that the statute complies with the free speech provisions of the New York State Constitution. People v. Ferber, 57 N.Y.2d 256 (1982). The presumption of constitutionality that applies to every duly enacted statute is enhanced where, as here, it has been "long acquiesced in and. . . treated as valid. See McKinney's Cons. Laws of NY, Book 1, Statutes § 150(b) at 317-18.

Relying primarily on the Ninth Circuit's decision in Free Speech Coalition v. Reno, ___ F.3d ___, 1999 U.S. App. LEXIS 32704 (9th Cir. December 17, 1999), defendant claims that this statute is overbroad because a person who promotes the sexual performance of a "fictional representation" of a child could be swept within the ambit of the statute (Defendant's Brief at 5362). This claim must fail because a statute is overbroad only when its overbreadth is "real" and "substantial." Osborne v. Ohio, 495 U.S. at 112. Overbreadth cannot be shown merely by citing to isolated instances when a statute might reach protected speech. See

People v. Hollman, 68 N.Y.2d at 208 ("few of our criminal statutes would survive judicial scrutiny if they could be stricken because of a remote possibility that they might, as applied to an unusual set of facts, reach protected conduct").

Defendant has not shown that any prosecutor has ever interpreted the New York statute in the manner that he now suggests. Nor has he shown that there has been any "chilling" of protected speech as a result of confusion as to whether this statute can be so interpreted. Thus, defendant has not proven any real or substantial overbreadth sufficient to invalidate the statute. See Osborne v. Ohio, 495 U.S. at 112; Broadrick v. Oklahoma, 413 U.S. at 613.

Furthermore, as the Appellate Division specifically found in this case, the "People submitted sufficient proof that the graphic images sent by defendant were pictures of actual children and had not been altered. The jury had the pictures before it to review, and its determination that the pictures represented actual children is supported by the record. People v. Foley, 257 A.D.2d at 253-54. Thus, there is no evidence in this, or in any other New York case, that the statute has been interpreted in the manner suggested by defendant.[29]

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[29] There is, however, support for the proposition that a statute criminalizing computer generated child pornography passes constitutional muster under the First Amendment. See United States v. Hilton, 167 F.3d 61 (1st Cir.), cert. denied, ___ U.S. ___, 120 S. Ct. 115 (1999), but see Free Speech Coalition v. Reno, 1999 U.S. App. LEXIS 32704, supra. The Court need not reach this issue because defendant has not demonstrated that this lone example of potential overbreadth is sufficient to render Penal Law § 263.15 substantially overbroad.

If, however, this Court finds that the statute is overbroad, any such overbreadth can be cured by limiting the application of the statute to sexual performances by actual as opposed to "fictional" children. See, People v. Hollman, 68 N.Y.2d at 208. This construction is supported by the plain language of the statute, which outlaws a sexual performance by "a child less than sixteen years of age." See Penal Law § 263.15. In this context, the word "child" can be interpreted to mean an actual child. Such a construction would address defendant's overbreadth concerns by removing those who promote the sexual performances of "fictional" children from the scope of the statute.

In sum, defendant's overbreadth claim must fail because he has failed to demonstrate that Penal Law § 263.15 is substantially overbroad. In the event that this Court finds that the statute is overbroad, any such overbreadth can be cured by adopting the proposed limiting construction.

CONCLUSION

For the reasons set forth above, the Appellate Division's decision affirming defendant's judgment of conviction should be affirmed.

Respectfully submitted,

ELIOT SPITZER
Attorney General of the
State of New York

By: /s/
ROBIN A. FORSHAW
Assistant Attorney General
120 Broadway
New York, New York 10271
(212) 416-8370

PREETA D. BANSAL
Solicitor General

ROBIN A. FORSHAW
MARK H. LEVINE
JAMES M. HERSHLER
Assistant Attorneys General
of Counsel

February 2, 2000

EXHIBIT A

NEW YORK STATE SENATE
INTRODUCER'S MEMORANDUM IN SUPPORT
submitted In accordance with Senate Rule VI, §1

( ) Memo on original bill
(x) Memo on amended bill

SENATE BILL #: S. 210-E ASSEMBLY BILL #: A. 3967-C

SENATE SPONSOR(S): SENATOR WILLIAM R. SEARS

ASSEMBLY SPONSOR(S):
MEMBER OF ASSEMBLY ROANN M. DESTITO

TITLE:

An act to amend the penal law, in relation to disseminating indecent, materials to minors through any computer communication system.

SUMMARY OF PROVISIONS:

Amends section 235 of the Penal law-by establishing the crimes of disseminating indecent materials to a minor in the first and second degree;

Disseminating indecent materials to a minor in the second degree is defined as knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse and which is harmful to minors, he intentionally uses any computer communication system allowing the input, output, examination or

transfer, of computer data or computer programs from one computer to another, to initiate or engage in such communication with a person who he has reason to believe is a minor. Disseminating indecent materials to a minor in the second degree is deemed to be a class E felony.

Dissemination of indecent materials to a minor in the first degree is defined as knowing the character and content of the communication and intentionally initiating or engaging in the communication with a person who is a minor and, by means of this communication, inducing, importuning or inviting a minor to engage in sexual intercourse, deviate sexual intercourse, or a sexual performance. Disseminating indecent materials to a minor in the first degree is a class D felony.

Defenses and limitations are provided to limit prosecutions for disseminating indecent materials under this bill for scientific, educational, governmental or other similar justification; those situations in which the minor misrepresented their true age; for those persons who merely provided Access, without knowledge of and control over the defendant's actions; and for those who utilize "blocking" software, or other reasonably effective measures, to restrict and prevent access by minors.

JUSTIFICATION:

Law enforcement agencies around the nation are becoming increasingly alarmed at the growing use of computer networks and other communications by pedophiles. Several cases have come to light wherein a pedophile has traveled clear across the country to have sexual relations with a minor initially contacted and engaged through various computer networks.

Typically, the pedophile, posing as a minor, makes contact, wins the confidence of the minor and slowly begins to draw the victim into discussions of sex and sexuality. In several cases the pedophile has induced minors to take nude photos of themselves and send these to the abuser, who may or may not reveal that he is not what he seems. Sometimes the pedophile will pose as a young male; other times as a female ... whatever it takes to gain the trust of the victim.

The recently passed federal crime bill contains provisions to address at least part of this issue: interstate travel for the purpose of having sexual relations with a minor. However, even if such travel does not occur and actual physical contact is not made between pedophile and victim, the minor is still being exploited. For an adult to represent himself as a minor and engage another minor - male or female - in sexually infused communication is wrong and when accomplished over a computer network or other communications- system it is long distance, high-tech sexual abuse. This bill addresses the issue of these communications.

LEGISLATIVE HISTORY:

New bill.

FISCAL IMPLICATIONS:

None.

EFFECTIVE DATE:

This act shall take effect the first day of November next succeeding the date on which it shall have become law.

SUMMARY OF AMENDMENTS:

Amendments were necessary for the bill to be consistent with the recently passed Federal Communications Decency Act and Constitutional requirements. The amendments limit the application of the bill to exclude those who merely provided the defendant access to their computer or computer network. The bill would also provide a defense for those who take good faith steps to attempt to avoid contacts with minors through the use of "blocking" type software or other reasonably effective measures. Furthermore, it should be noted that the "harmful to minors" standard contained in the charging language of the offense is consistent with the Federal law because the definition of "harmful to minors" states that such material is patently offensive to the standards of the community. Penal Law § 235.20(6) (b).

EXHIBIT B

NEW YORK
STATE
SENATE

July 11, 1996

Governor George E. Pataki
State Capitol
Albany NY 12224

Dear Governor Pataki,

Thank you for the opportunity to comment on Senate Bill 210-E, now before you for consideration. This bill would add a significant weapon in the fight .against people who pray on children over computer networks.

The purpose of this bill is deter individuals who would use computer networks to lure children into sexual relations by intentionally transmitting indecent materials to children through the computer networks. The bill would not hold liable a computer network or other individual who did not intentionally transmit the materials to minors.

This bill is consistent with the Federal Communications Decency Act as well as with existing state law designed to protect children from the harmful effects of indecent print materials, films, and videotapes. This legislation addresses the next level of technology, computer networks.

For an adult to engage a minor, male or female, in sexually infused communication is wrong and when accomplished

over a computer network or other communications system it is in fact long-distance, high-tech sexual abuse. This bill addresses the issue of these communications.

Sincerely,

/s/
WILLIAM R. SEARS
Senator, 47th District

WRS:tdv

EXHIBIT C

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

Sep 4 1996

MEMORANDUM filed with Senate Bill Number 210-E, entitled:

"AN ACT to amend the penal law, in relation to disseminating indecent material to minors through any computer communication system"

CHARTER 600
APPROVAL #84

APPROVED

The advent of new technologies and their availability to the general public has ushered in the Information Age. Our children are learning how to "cruise the information superhighway" and "surf the net," while seated at a computer terminal in school or at home. Today, many children can instantly access the resources of the Library of Congress or browse the art collection of tile Vatican or the Louvre, via the Internet. Many of the world's cultural treasures are now but a few key strokes away. However, this seemingly limitless and powerful resource for education and recreation has a disturbing dark side. Many pedophile are now only a few key strokes away from our children.

Several cases have come to light, wherein pedophiles have engaged in sexually explicit communications with minors and then attempted to arrange sexual encounters with these minors. One

such case involved an adult mate resident of Seattle, Washington, who exchanged sexually explicit communications with a thirteen-year-old girl via computer for a period of several months. He then traveled to New York and attempted to meet the girl. We must not allow our children to fall prey to those who would exploit them through this new technology.

Recognizing the seriousness of this problem, Congress enacted the Communications Decency Act of 1996 to prohibit the interstate transmission of obscene telecommunications. This bill addresses intrastate communications and is consistent with the federal statute.

The bill amends the Penal Law to establish the crimes of disseminating indecent materials to a minor in tile first and second degree. Under the provisions of this bill a person is guilty of disseminating indecent materials to a minor in the second degree, a class E felony, when knowing the character and content of the communication which, in whole or in part, depicts actual or simulated nudity, sexual conduct or sado-masochistic abuse, and which is harmful to minors, he intentionally uses any computer communication system to initiate or engage in such communication with a person who he has reason to believe is a minor. While the defendant must know the character and content of the communication, the statute does not require that the defendant know the communication is harmful to minors. The bill further provides that a person is guilty of disseminating indecent materials to a minor in the first degree, a class D felony, when lie engages in the communications proscribed in the second degree offense and by means of this communication he importunes, invites, or induces a minor to engage in sexual conduct.

The central purpose of the bill - preventing the dissemination of indecent materials to minors - would be undercut substantially if the new offenses required proof that the defendant knew he was communicating, or intended to communicate, with a minor. Accordingly, such proof is not required - as is apparent from the defenses created by new subdivision 3 of section 235.23 of the Penal Law, which contemplate criminal liability in the absence of such proof In this regard, moreover, the bill does not go too far, for there is nothing unjust about requiring on pain of criminal liability that persons who use computers to disseminate indecent materials take reasonable and responsible measures to guard against their dissemination to minors.

To the contrary, although the bill thus takes appropriately strong steps to protect our children, the defenses set forth in subdivision 3 will ensure that it is not applied unjustly. It is a complete defense if the defendant, for example: made a reasonable effort to ascertain the true age of the minor but was thwarted by the minor's actions; took reasonable, effective and appropriate actions in good faith to restrict or prevent access by minors to the indecent materials; or restricted access to such materials by a blocking mechanism.

A number of publishers, on-line service providers, and Internet service companies have expressed the concern that this legislation will infringe on the first amendment rights of adults and "chill" the growth of technology-related businesses in New York. Some suggest that parents and teachers can best control a minor's access to objectionable materials by blocking it at the receiving computer. I agree that parents and teachers need to oversee the materials to which children have access and that software permitting guardians to filter out inappropriate materials is helpful. Protecting our children from pedophiles and those disseminating indecent materials to children, however, requires

the active intervention of the criminal law, not passive reliance on technology or even the vigilance of parents and teachers. The first amendment objections to the bill are not persuasive, largely because the bill does not purport to regulate the nature of communications between adults. Furthermore, the bill contains carefully crafted provisions exempting from prosecution access providers to a network and those furnishing incidental services associated with access.

The legislation I approve today protects the children of this State from high-tech cybersex abuse and actual sexual abuse. I am gratified, moreover, that as project New York Wired for Education gets under way and we connect our schools and libraries to the Internet, we will be able to provide these safeguards.

The bill is approved.

A-297

To be Argued by:
Paul J. Cambria, Jr., Esq.
Estimated Time for Argument:
30 Minutes

STATE OF NEW YORK
COURT OF APPEALS

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

THOMAS R. FOLEY, SR.,
Appellant.

APPELLANT'S BRIEF IN REPLY TO THE BRIEF OF THE STATE OF NEW YORK AS INTERVENOR

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
PAUL J. CAMBRIA, JR., ESQ.
ROGER W. WILCOX, JR., ESQ.
Attorneys for Defendant/Appellant
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333

February 13, 2000

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PREFACE

Appellant submits this brief in reply to the brief submitted by the New York State Attorney General as Intervenor. For the sake of brevity and to avoid repetition, and given the time constraints involved, appellant will rely on the arguments contained in his principal and reply briefs which have already been submitted on this appeal and will address only certain contentions of Intervenor.

POINT ONE

PENAL LAW §235.22 IS OVERBROAD AND VAGUE IN VIOLATION OF THE FIRST, FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 8 OF THE CONSTITUTION OF THE STATE OF NEW YORK

A. 1. Penal Law §235.22 Is Substantially Overbroad.

In rather summarily dismissing appellant's overbreadth challenge before quickly proceeding into a saving construction argument, Intervenor claims that appellant seeks to have this Court ignore the luring prong of Penal Law §235.22. In truth, appellant has urged the Court to examine that second prong of the statute for the purpose of finding that its provisions are wholly inadequate safeguards against the chilling of protected speech. As is discussed in detail in appellant's original brief on appeal and his reply brief, the vague elements set forth in the luring prong of Penal Law §235.22 coupled with the omission of a specific intent and overt act requirement create an imprecise regulation of Internet speech which draws otherwise lawful expression within the sweep of its criminal prohibitions.

The overbreadth of Penal Law §235.22 is real and substantial. People v. Hollman, 68 N.Y.2d 202, 208, 507 N.Y.S.2d 977, 982 (1986). It bears emphasis that the reach of the statute is not measured against all of the types of expression available to human beings. Rather, the breadth of a speech regulation's impact is assessed by examining the scope of its intended application. People v. Hollman, supra at 209, 507 N.Y.S.2d at 982 ["Where, as here, the impermissible applications of a statute represent only a tiny fraction of the conduct within the statute's reach, the overbreadth will not be considered substantial" (citation omitted)]. Penal Law §235.22 regulates only computer-generated communications, and in an attempt to criminalize only a tiny fraction of all Internet communications extends its reach far beyond the legislatively targeted evil.

Moreover, contrary to Intervenor's contentions, the inclusion of a statutory defense that the accused Internet speaker made a reasonable effort to ascertain the age of the person with whom he has communicated does not bring the sweep of the statute within constitutionally permissible limits. Not only does Intervenor's argument ignore the reality that there is no effective way for non-commercial Internet speakers to accurately determine the age of a message recipient (see, Reno v. American Civil Liberties Union, 521 U.S. 844, 882, 117 S.Ct. 2329, 2349-50 [1997]), reliance on such an ineffectual defense gives life to the "heckler's veto" and allows public Internet discourse on sexually-related topics to be shut down by any participant claiming -- truthfully or not -- to be under the age of eighteen.

2. Intervenor's Proposed Saving Construction Will Not Cure The Overbreadth Of Penal Law §235.22.

Interestingly, while the Oneida County District Attorney maintains that the Legislature purposely omitted a specific intent element from Penal Law §235.22 (see, Respondent's brief at p.22), the New York State Attorney General counters that the Legislature intended to limit the scope of the statute by inclusion of such an element. Appellant submits that even if this Court could apply a saving construction which reads into the statute a specific intent requirement applicable to both prongs, such a construction would still not be adequate to remedy the constitutional defects of Penal Law §235.22.

Contrary to Intervenor's representations, appellant has not conceded that the statute's overbreadth can be cured by a limiting construction. Rather, appellant has merely pointed out that, without a specific intent element, Penal Law §235.22 does not contain even the most minimal protection against improper application of its criminal prohibitions. Furthermore, appellant has consistently maintained that because certain elements of the luring prong of Penal Law §235.22 ("importunes, invites or induces") permit criminalizing of pure speech (i.e., fantasy talk), the only way to ensure a legitimately narrow scope of application of the statute is to require proof of some overt act in furtherance of the luring objective in addition to proof of a specific intent to communicate with a minor. See, e.g., People v. Barrows, 177

Misc.2d 712, 677 N.Y.S.2d 672 (1998).[1] Intervenor's suggestion that the addition of a specific intent element alone will suffice inasmuch as the jury would thereby be required to consider the "totality" of a defendant's actions, including whether he committed any overt acts, is insufficient given that the jury would not be required to find facts establishing that the accused's communication moved beyond pure speech or imagination/fantasy into a real attempt to effectuate a meeting between the accused and a minor.

The saving construction posed by Intervenor also clearly conflicts with the Governor's understanding of the proof requirements of Penal Law §235.22:

> The central purpose of the bill -- preventing the dissemination of indecent materials to minors -- would be undercut substantially if the new offenses required proof that the defendant knew he was communicating, or intended to communicate, with a minor. Accordingly, such proof is not required -- as is apparent from the defenses created by new subdivision 3 of section 235.23 of the Penal Law, which contemplate criminal liability in the absence of such proof.

Governor's Memorandum on approving L.1996, c. 600 (September 4, 1996).

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[1] Intervenor claims that appellant mistakenly represented that the Barrows Court read an overt act requirement into Penal Law §235.22. Appellant maintains that a fair reading of the Barrows decision shows that the Court did just that. People v. Barrows, supra at ___, 677 N.Y.S.2d at 685.

The Governor's reference to the defenses set forth in Penal Law §235.23(3) is significant. These defenses are inconsistent with a legislative intent to incorporate a specific intent element into Penal law §235.22. Indeed, it is unlikely that the Legislature intended to allow someone who intentionally communicated with a minor to escape liability because he made a reasonable effort to ascertain the true age of the minor or asked for a credit card or other age verification. If the accused possessed the intention of engaging in a prohibited communication with a minor, then the statutory defenses would be ineffectual. If he did not have the requisite specific intent to communicate with a minor, then the defenses would be inapplicable. See, American Civil Liberties Union v. Johnson, 194 F.3d 1149, 1159-60 (10th Cir. 1999) [where the Circuit Court of Appeals examined a similar ordinance (minus the luring prong) and rejected a saving construction limiting application of the statute to intentional conduct on the ground that it conflicted with the defenses set forth in the law]. Accordingly, the limiting instruction proposed by Intervenor is not reasonably implicit in the language of the statute. People v. Dietze, 75 N.Y.2d 47, 52, 550 N.Y.S.2d 595, 598 (1989). Any revision of Penal Law §235.22 by this Court to incorporate a specific intent element of proof would "be tantamount to wholesale revision of the Legislature's enactment, rather than prudent judicial construction." Id. at 53, 550 N.Y.S.2d at 598 (citation omitted).

Finally, Intervenor has failed to explain how the definition of the "harmful to minors" element of Penal Law §235.22(1) will be narrowed to acceptable constitutional limits by the proposed limiting construction. Regardless of whether a specific intent element is incorporated into Penal Law §235.22, the statute will necessarily export New York's community standard as to what is obscene as to children beyond its geographical limits, thus forcing

Internet users outside the state to tailor the content of their otherwise lawful sexually-oriented expression to that which is fit for children under New York's prevailing standards. See, People v. Barrows, supra at 729, 677 N.Y.S.2d at 683. Intervenor's claim that "it is unlikely that any material considered to be 'harmful to minors' in New York would not be considered 'harmful to minors' outside New York" due to New York's liberal community standards is wholly speculative and has no basis in law.

With respect to the remaining arguments advanced by Intervenor in Point One of its brief, appellant relies on those arguments advanced in his principal and reply briefs which have previously been submitted on this appeal.

POINT TWO

PENAL LAW §235.22 VIOLATES THE COMMERCE CLAUSE AND IS THEREFORE INVALID

Intervenor posits that appellant does not have standing to assert a Commerce Clause violation because the relevant conduct in this case occurred wholly within the geographical borders of New York State. Intervenor's argument ignores the practical reality of the Internet's role in interstate commerce and fails to acknowledge that, "[b]y its terms, the Act applies to any communication, intrastate or interstate, that fits within the prohibition and over which New York has the capacity to exercise criminal jurisdiction." American Libraries Association v. Pataki, 969 F.Supp. 160, 169-70 (S.D.N.Y. 1997).

Regardless of the geographical location of appellant and his purported victim at the time the computer-generated communications occurred, the fact is that Penal Law §235.22 "cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist." Id. at 171. Indeed, as the Tenth Circuit Court of Appeals found in American Civil Liberties Union v. Johnson, 194 F.3d 1149, 1161 (citations omitted):

> Moreover, the nature of the Internet forecloses the argument that a statute such as Section 30-37-3.2(A) applies only to intrastate communications. Even if it is limited to one-on-one e-mail communications, as defendants assert Section 30-37-3.2(A) properly is limited, there is no guarantee that a message from one New Mexican to another New Mexican will not travel through other states en route. Thus, Section 30-37-3.2(A) 'cannot effectively be limited to purely intrastate communications over the Internet because no such communications exist.' We therefore agree with the District Court that Section 30-37-3.2(A) represents an attempt to regulate interstate conduct occurring outside New Mexico's borders, and is accordingly a *per se* violation of the Commerce Clause.

Further, Intervenor's contention that Penal Law §235.22 "has little or no connection to any type of commercial activities within the traditional sweep of the Commerce Clause" is without merit (see, Intervenor's Brief at p.33). As the American Libraries Court concluded, "[t]he inescapable conclusion is that the Internet represents an instrument of interstate commerce, albeit an

innovative one; the novelty of the technology should not obscure the fact that regulation of the Internet impels traditional Commerce Clause considerations." American Libraries Association v. Pataki, supra at 173. Intervenor mistakenly relies on the same premise that the Appellate Division, Fourth Department, advanced in rejecting appellant's Commerce Clause argument below - that Penal Law §235.22 does not regulate legitimate commerce. As appellant noted in his principal brief on appeal to this Court, the question is not whether the statute will burden commerce intentionally and illicitly directed at children. Rather, the interstate commerce-related concern is that lawful Internet-based commercial entities which purvey or advertise products and services intended for adults will be caught up in the broad sweep of New York's criminal Internet communication regulations. Also, Intervenor's argument in this regard is premised on the contention that Penal Law §235.22 is targeted at only those individuals who intentionally use the Internet to lure minors into illegal sexual activity. As noted above, however, the statute is not reasonably susceptible to such a construction, leaving open the potential for prosecution of interstate communications which even unintentionally violate the proscriptions of Penal Law §235.22. Furthermore, the existence of the luring prong of Penal Law §235.22(2) does not remove legitimate communications from the sweep of the statute given that even the luring elements do not prevent the prosecution of pure speech.

That the use of a paging system in a murder-for-hire scheme was found not to implicate interstate commerce in United States v. Paredes, 950 F.Supp. 584 (S.D.N.Y. 1996), aff'd, 162 F.3d 1149 (2d Cir. 1998), is of no moment. The underlying rationale of the Paredes decision was a desire to curb the expansion of federal criminal jurisdiction based on the Commerce Clause. United States v. Paredes, supra at 589 ["as the original

role of federal criminal jurisdiction was intended to be limited in nature, it is troubling to permit technological innovation to significantly expand its scope without a specific expression of Congressional intent"]. Most notably, no Commerce Clause violation was asserted in Paredes.

Penal Law §235.22 impermissibly burdens interstate commerce in violation of the Commerce Clause and appellant respectfully requests that his convictions for attempted violation of that statute be reversed and the indictment dismissed.

POINT THREE

PENAL LAW §263.15 IS OVERBROAD IN VIOLATION OF THE FEDERAL AND STATE CONSTITUTIONS

Intervenor's brief echoes respondent's in its reliance on the mere fact of Penal Law §263.15's survival in the face of entirely different prior challenges to its validity. This position reflects a refusal to recognize the significance of the growth of Internet communications and the pervasiveness of computer-generated imagery on the Internet.

As the New York State Legislature recognized with the enactment of Penal Law §235.22 in 1996 and Congress acknowledged with the passage of the Child Pornography Protection Act ("CPPA") that same year, technological advances during the almost twenty-three years since the enactment of Penal Law §263.15 has led to sweeping changes in both the methods of popular communication and in creative imaging technologies. These changes permit the creation of fictional images of people, animals, objects, etc., which appear to be actually real, as was

recognized by both the defense and prosecution witnesses at trial [737-41, 1014-18].

Appellant's challenge to the constitutionality of Penal Law §263.15 cannot be dismissed simply because others before him have failed in their attacks on the statute. Constitutional jurisprudence is not static; as expressive media emerge, develop and change, the impact of speech restrictions must be judged anew in light of the potential for overly broad applications of even partly anachronistic regulations. Consequently, appellant's overbreadth claim should not be rejected on the force of precedent which has divergent factual justification.

As the Ninth Circuit Court of Appeals has observed, "non-obscene sexual expression that does not involve actual children is protected expression under the First Amendment." Free Speech Coalition v. Reno, ___ F.3d ___ (12/17/99). There, in finding the CPPA provision criminalizing the creation of images which even appear to be child pornography to be overbroad, the Ninth Circuit discussed the Senate's failure to accord proper significance to the changes in technology since Ferber was decided in 1982:

> The danger with this analysis is that it suggests that the more realistic an imaginary creation is, the less protection it is entitled to under the First Amendment. This is not because of any harm caused in its creation, rather it is because of the consequences of its purported reality. Yet, the Supreme Court has restricted the regulation of pornographic material involving minors because of the harm caused by its creation, not necessarily because of the consequences of its creation. The

> government's interest in prohibiting computer-generated child pornographic depictions is not the same as its interest in prohibiting child pornography using actual children. In the latter instance there may be direct and indirect harm to a child. In the former instance there is no harm, and there can be none, to an actual child, if no real human is used in the production of the images. What is left then is an inconsistent effort to regulate the evil consequences of abusing children to make such images, even though no children are used in its production.

Free Speech Coalition v. Reno, supra.

While the CPPA and Penal Law §263.15 contain differing elements, the absence of a requirement under New York law that the jury find not only that the image at issue depicts what appears to be a child under sixteen years of age, but also that it depicts an actual child, has the same functional effect of the "appear to be" language of the CPPA: under both statutes the accused may be convicted even though the image does not represent a child who exists or existed in reality.

The savings construction proposed by Intervenor -- limiting the application of Penal Law §263.15 to sexual performances by *actual* as opposed to fictional children -- would cure the overbreadth of future applications of the statute. It would not, however, change the fact that appellant's jury was not instructed to determine whether the graphic images at issue in his trial depicted actual children, an instruction necessary to narrow the application of Penal Law §263.15 to a constitutionally permissible scope. Accordingly, the violation of appellant's rights

under the First and Fourteenth Amendments to the United States Constitution and Article I, Section 8 of the Constitution of the State of New York requires reversal of his convictions for promoting the sexual performance of a child.

CONCLUSION

Appellant reiterates his request that this Court reverse the decision and order of the Appellate Division, Fourth Department, affirming his convictions and dismiss the indictment or, in the alternative, grant him a new trial.

DATED: February 13, 2000

Respectfully submitted,

LIPSITZ, GREEN, FAHRINGER,
ROLL, SALISBURY & CAMBRIA LLP
PAUL J. CAMBRIA, JR., ESQ.
ROGER W. WILCOX, JR., ESQ.

By /s/
ROGER W. WILCOX, JR.

Attorneys for Defendant/Appellant
42 Delaware Avenue, Suite 300
Buffalo, New York 14202
(716) 849-1333